Exceptional Professional, Inc. d/b/a EPI Construction *and* Carpenters' District Council of Kansas City and Vicinity Locals 311 and 978 affiliated with United Brotherhood of Carpenters and Joiners of America. Cases 17–CA–19272, 17–CA–19325, and 17–CA–19385

September 28, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

On August 5, 1998, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief,[1] and the Union filed a brief in opposition to the Respondent's exceptions.[2]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions only to the extent consistent with this Decision and Order.[4]

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider for hire or to hire 10 job applicants because of their union membership or activities, by laying off 4 employees and suspending 2 employees because of their union membership or activities, by requiring an applicant to predate his employment application for discriminatory purposes in order to avoid hiring union applicants, and by promulgating for discriminatory purposes a drug and alcohol abuse and testing policy as a term and condition of employment.[5] The judge also found that the Respondent violated Section 8(a)(4) and (1) by establishing a grievance and arbitration procedure restricting the rights of employees to use the processes of the NLRB. The judge further found that the Respondent violated Section 8(a)(1) by informing its employees that it would be futile to select the Union as their bargaining representative, creating the impression among its employees that their union activities were under surveillance, promulgating a rule that discriminatorily prohibited employees from talking about the Union or any other labor organization while working, interrogating its employees about their union membership, activities, and sympathies, and threatening its employees with layoff if they supported the organizing efforts of the Union.

For the reasons discussed below, we remand to the judge for further consideration the complaint allegation that the Respondent unlawfully refused to consider for hire or to hire 10 applicants, and we reverse her finding that the Respondent unlawfully established a grievance and arbitration procedure restricting the rights of employees to use the processes of the NLRB. We otherwise adopt the judge's findings with certain modifications, as set forth below.[6] We shall issue a final Order with respect to the complaint allegations not remanded.

1. As noted above, the judge, in section II,B,6 of her decision, found that the Respondent unlawfully refused to consider for hire or to hire 10 applicants because of

[1] The General Counsel's answering brief was erroneously labeled a reply brief. See Sec. 102.46(d) and (h) of the Board's Rules and Regulations.

[2] The Respondent also filed a motion to reopen the record. The General Counsel and the Union filed responses in opposition to the motion. The Respondent's motion seeks to introduce into evidence copies of letters, asserted to constitute job offers, that the Respondent represents that it mailed to 15 of the alleged discriminatees after issuance of the judge's decision in this case. We deny the motion, because the letters sought to be introduced, even if found to constitute unconditional offers of employment, would not alter the requirements set forth in the Order. See *Hedaya Bros.*, 277 NLRB 942 fn. 1 (1985). The letters are relevant, if at all, only with respect to the remedial aspect of the case. Thus, they may be presented at the compliance phase of this proceeding. See *Challenge-Cook Bros. of Ohio*, *Inc.*, 282 NLRB 21, 26 fn. 7 (1986), enfd. 843 F.2d 230 (6th Cir. 1988).

We also deny the Respondent's request for oral argument, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, some of the Respondent's exceptions contend that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[4] We have revised certain portions of the judge's recommended Order to more accurately reflect the violations found, to use our customary order language, and to conform to our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

[5] We adopt the judge's finding, in sec. II,B,13 of her decision, that the Respondent violated Sec. 8(a)(3) and (1) by discriminatorily promulgating a drug and alcohol abuse policy. There are no exceptions to the judge's failure to find whether Respondent's change of an attendance rule, discussed in the same section, violated the Act. There was no complaint allegation concerning this attendance rule change.

[6] We adopt the judge's finding, in sec. II,B,5 of her decision, that Foreman Randy Rucker violated Sec. 8(a)(1) when he told employee Jerry Brown that Fred Stewart, the Respondent's president, would lay Rucker off if he talked about the Union on the job. Such a statement interferes with the exercise of employee rights because Brown could reasonably infer from Rucker's statement that he also would be laid off if he talked about the union on the job. See *Winett, Inc.*, 135 NLRB 1305, 1310–1311 (1962).

their union membership.[7] On May 11, 2000, the Board issued its decision in *FES,* 331 NLRB 9, setting forth the framework for analyzing refusal-to-hire and refusal-to-consider allegations. We have decided to remand this case to the judge for further consideration in light of *FES*, including, but not limited to determination of: (1) whether there were available openings at the time that the alleged discrimination occurred; (2) the number of such available openings; and (3) whether the applicants had training and/or experience relevant to the announced or generally known requirements of the openings and whether those requirements were not uniformly adhered to or were either pretextual or pretextually applied. The judge may, if necessary, reopen the record to obtain evidence required to decide the case under the *FES* framework.

2. In section II,B,2 of her decision, the judge found that certain statements made by working Foreman Steve Ceruzzi[8] in April 1997[9] at the James River Power Plant and at the Overland Park, Kansas jobsite violated Section 8(a)(1), as they indicated to employees that pursuing unionization would be futile and that their union activities were under surveillance.[10] The Respondent contends that these violations are barred by Section 10(b) of the Act,[11] because no charge was filed that alleged any violation occurring earlier than June 30.

We do not agree that the violations concerning Ceruzzi's April statements are barred by Section 10(b) of the Act. On September 29, the Union filed the second amended charge in Case 17–CA–19272, alleging that, since July, the Respondent had told employees that it would be futile to select the Union as their collective-bargaining representative and that the Respondent had created an impression of surveillance of employee union activities. The General Counsel subsequently issued the second amended complaint, alleging that, in early to mid-April, at the James River Power Plant, and in late April, at the Overland Park, Kansas jobsite, the Respondent, through Ceruzzi, had informed employees that it would be futile to select the Union as their bargaining representative. The second amended complaint also alleged that in late April, at the Overland Park jobsite, the Respondent, through Ceruzzi, had created the impression among employees that their union activities were under surveillance by the Respondent.

The Board in *Redd-I, Inc*., 290 NLRB 1115 (1988), held that in determining whether complaint allegations are closely related to an unfair labor practice charge, it would examine whether the complaint allegations involve the same legal theory as the allegations in the charge, whether the complaint allegations arise from the same factual situation or sequence of events as the allegations in the charge, and whether a respondent would raise the same or similar defenses to the complaint allegations as it would have raised to the allegations in the charge.[12] In applying the criteria set forth in *Redd-I, Inc*., supra, we find that the violations found by the judge concerning Ceruzzi's April statements are closely related to those alleged in the second amended charge. Thus, the violations involve the same legal theories and arise from the same factual circumstances or sequence of events as those set forth in the charge, i.e., unlawful statements creating the impression of surveillance and indicating that selection of the Union would be futile. Additionally, we find that the Respondent would have raised similar defenses to the violative conduct and to the allegations set forth in the charge, as the charge

[7] The applicants were James Carsel, Larry Collinsworth, John Duncan, Roger Hensley, Bob Hurn, Mike Joyce, Tom McFarland, Matthew Rausch, Shelley Williams, and Steven Wilson.

[8] We agree with the judge's finding, in sec. II,B,1 of her decision, that Ceruzzi, as well as working Foremen Randy Rucker and Mike Vernon, are agents of the Respondent under Sec. 2(13) of the Act. Chairman Hurtgen and Member Truesdale also agree with the judge's finding that Ceruzzi, Rucker, and Vernon are supervisors under Sec. 2(11) of the Act. In adopting the latter finding, Chairman Hurtgen and Member Truesdale do not rely on the judge's finding that Ceruzzi, Rucker, and Vernon responsibly directed the work force. Rather, Chairman Hurtgen and Member Truesdale rely on her finding that Ceruzzi, Rucker, and Vernon authorized employees' time off and that they effectively recommended whether employees were retained and whether employees received pay increases.

Member Walsh agrees with the judge's finding that Ceruzzi and working Foremen Rucker and Vernon are agents of the Respondent, but finds it unnecessary to pass on her finding that the working foremen are supervisors pursuant to Sec. 2(11) of the Act.

[9] All dates are in 1997 unless otherwise indicated.

[10] Responding to a general contractor's warning that Ceruzzi should "watch his back because the union is supposed to be out for these companies," Ceruzzi replied that "we don't have to worry about that . . . Fred [Stewart, the Respondent's president] is a lot smarter than that and the union will never infiltrate EPI." Ceruzzi added that the Respondent had one union member working for it. On a second occasion in April, Ceruzzi stated that the Respondent knew that there was "a guy from the Union in the company and that there was no way in hell the Union was going to infiltrate this company." Both statements were made in the presence of one or more employees.

[11] Sec. 10(b) states, in pertinent part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect . . . *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . . Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

[12] Id. at 1118; see also *Nickles Bakery of Indiana, Inc*., 296 NLRB 927, 928 (1989).

alleged the same type of conduct as the judge found to have occurred, albeit at a time approximately 3 months earlier than that alleged in the charge. We also note that the second amended complaint put the Respondent on notice that the alleged conduct at issue occurred in April. Accordingly, as the violations regarding Ceruzzi's April statements are closely related to those alleged in the second amended charge filed September 29 and as they occurred less than 6 months before that charge was filed, we find that they are not barred by Section 10(b), and we adopt them.

3. In section II,B,4 of her decision, the judge found that on August 4 at the Fairview Elementary School jobsite, Foreman Mike Vernon unlawfully interrogated employees Glen Easterly and Don Stewart. Vernon first told Easterly and Stewart[13] that he could not say anything for or against the Union but added that the Union had never done anything for him. Vernon then grabbed Easterly's shirt pocket and asked if there was a tape recorder. Easterly and Stewart treated the comment as a joke. However, Vernon then twirled Easterly around and patted him down, prompting Easterly to tell Vernon, "That's enough." Vernon asked Easterly and Stewart why they were trying to "steal our jobs." Easterly responded that the intent of the program was not to steal jobs but that they were there as union salts to try to educate employees who wanted information about the Union.[14]

We agree with the judge's conclusion, utilizing the totality of the circumstances test,[15] that Vernon's August 4 questioning of Easterly and Stewart was coercive and violated Section 8(a)(1). Vernon's interrogation of Easterly and Stewart occurred against the following background. In April, after "covert salts" had begun working for the Respondent, Foreman Ceruzzi, as discussed in section 2 above, twice unlawfully stated, in the presence of employees, that there was one union member working for the Respondent and that the Union would never infiltrate the Respondent. On June 30, union organizer James Carsel and nine other union carpenters together applied for jobs with the Respondent, telling the Respondent's president, Fred Stewart, that, if hired, they would try to organize the Respondent.[16] On July 3, as discussed more fully in section 4, below, Sandy Garlette, the Respondent's receptionist, unlawfully told job applicant Hackenberg, who was not affiliated with the Union, to backdate his application because union representatives had been in the office earlier that week. Thereafter, several "covert salts" working for the Respondent revealed their union affiliation. Thus, on July 18, employee Jerry Brown told Foreman Rucker that he was in the Union and tried to interest Rucker in joining the Union. A week later, Rucker unlawfully told Brown, as discussed at footnote 6 above, that Rucker could not talk about the Union or Fred Stewart would lay him off. On July 23, employees Charles Allison and Tom Piazza revealed their union membership to various employees and spoke about the Union. Allison identified himself to Foreman Ceruzzi as a union carpenter and stated that he intended to organize for the Union. In response to a question from Ceruzzi, Allison identified Piazza and employee Dan Joiner as also affiliated with the Union. On July 27, Carsel sent a letter to the Respondent stating that an organizing campaign was underway among its employees and that several of the Respondent's employees were working as "salts" for the purpose of organizing. On July 28, employee Jim Cherry announced that he was a union member and distributed authorization cards to other employees. Foreman Cron told Cherry that he had known that there was a salt on the crew but had not known it was Cherry. Also on July 28 and 29, as discussed in section 5, below, the Respondent unlawfully laid off employees Allison, Piazza, Jerry Brown, and Tim Phanelson because of their union activities. Fred Stewart, the Respondent's president, conducted a meeting for all employees at the Carthage elementary school jobsite on July 30 or 31, the day following distribution of authorization cards on that project. Fred Stewart unlawfully told the employees that he was not going to join the Union and it was probably going to cost him some money, but he was not going to join, and that's

[13] All references to "Stewart" without mention of a first name or job title indicate employee Don Stewart. All references to the Respondent's president, Fred Stewart, mention his first name or job title or both.

[14] Although the judge indicated in the analysis portion of sec. II,B,4 of her decision that Easterly and Stewart were admonished to get their cards back, her findings of fact are to the contrary. Thus, while Stewart testified that Cron had told him to get his card back, the judge, in the credibility portion of sec. II,B,4 of her decision, credited Cron's contrary account of this incident over that of Stewart. In finding that Vernon unlawfully interrogated Easterly and Stewart, we do not rely on the judge's statement that they were admonished to get their cards back.

[15] In applying this test, it is appropriate to consider various factors, including those set forth in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). See *Medcare Associates*, Inc., 330 NLRB 935, 939 (2000), applying *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The factors set forth in *Bourne,* 332 F.2d at 48, are as follows:

(1) The background, i.e. is there a history of employer hostility and discrimination?
(2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
(3) The identity of the questioner, i.e. how high was he in the company hierarchy?
(4) Place and method of interrogation, e.g. was the employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?
(5) Truthfulness of the reply.

[16] As indicated in sec. 1, above, the issue of the Respondent's refusal to hire and alleged refusal to consider for hire these 10 applicants is being remanded to the judge.

where he stood.[17] In sum, Vernon's August 4 interrogation of Easterly and Stewart was preceded by a number of unlawful incidents demonstrating the Respondent's hostility towards the Union and discrimination against union supporters.

Regarding other factors, the information that Vernon sought in his questioning of Easterly and Stewart—whether Easterly had a tape recorder and why he and Stewart were trying to "steal our jobs"—was not necessarily designed to provide a basis on which to take action against the employees, but the questions served as an expression of Vernon's hostility against the Union. Vernon, while a first-level supervisor, was not very far down the Respondent's managerial hierarchy, as he reported directly to Fred Stewart. Most importantly, the method of the interrogation, in which Vernon accompanied his questions with his physical manipulation of Easterly, conveyed coercion more directly than did mere verbal expression. These factors, coupled with the background of the Respondent's hostility toward the Union, militate strongly in favor of finding Vernon's interrogation of Easterly and Stewart coercive and, thus, violative of Section 8(a)(1). They are not offset by consideration of the remaining factors: the location of the interrogation at the employees' worksite, the truthfulness of the employees' reply, and the fact that Stewart might be considered an open union supporter, in that he had told a supervisor that he had signed a union card,[18] while Easterly had not revealed his union sympathies. We therefore adopt the judge's conclusion that Vernon's questioning of Easterly and Stewart was coercive and, thus, violative of Section 8(a)(1).

4. In section II,B,7 of her decision, the judge found that the Respondent, through its receptionist, Sandy Garlette, violated Section 8(a)(3) and (1) by requiring job applicant Jonathan Hackenberg to predate his employment application in order to avoid hiring union applicants. In adopting this finding, we reject the Respondent's contention that this violation was not alleged in the complaint. Paragraph 4(b) of the second consolidated complaint alleged that the Respondent's receptionist/secretary, a female office employee whose name was unknown to the General Counsel, was an agent of the Respondent. Paragraph 6(b) of the second consolidated complaint alleged that about July 3 the Respondent implemented a new policy of having job applicants whom it considered to be nonunion predate their employment applications in order to avoid hiring union applicants. Accordingly, the second consolidated complaint adequately alleged the violation.

We also find without merit the Respondent's contention that the violation must be dismissed because the General Counsel stated at the hearing that there was no allegation of any violation in the "interview process." The General Counsel made this statement in the context of employee Hackenberg's testimony about his "interview" by the Respondent's attorney, Don Jones. The clear import of the General Counsel's statement was that there was no allegation of any violation regarding Jones's interview of Hackenberg. The statement certainly was not a reference to Garlette's giving Hackenberg a job application or any statement she made to him at that time. Indeed, Garlette did not interview Hackenberg. Thus, the General Counsel's reference to the "interview process" could not have been a reference to any interaction between Garlette and Hackenberg.

5. We adopt the judge's findings, in section II,B,8 and 9 of her decision, that the Respondent violated Section 8(a)(3) and (1) by its July 28 layoffs of employees Charles Allison and Tom Piazza at its Springfield, Missouri project and employee Tim Phanelson at a Carthage, Missouri project and its July 29 layoff of employee Jerry Brown at the same Carthage project.[19] Under *Wright Line*,[20] the General

[17] In adopting the judge's finding that President Fred Stewart's statement on July 30 or 31 violated Sec. 8(a)(1), we agree that it unlawfully threatened that supporting the Union would be futile. In the context of Foreman Ceruzzi's earlier statement that pursuing unionization would be futile ("the Union will never infiltrate EPI"), Foreman Rucker's statement that Fred Stewart would lay him off if Stewart caught him talking about the Union, and the Respondent's discriminatory layoff of employees Allison, Piazza, Brown, and Phanelson based on their union activities, Fred Stewart's statement would reasonably be understood as a threat that if the employees selected the Union he would not recognize or bargain with the Union even if it cost him money. See, e.g., *Southwire Co.*, 277 NLRB 377 (1985), enfd. 820 F.2d 453 (D.C. Cir. 1987) (speeches unlawful in context of prior violations). Therefore, unlike our dissenting colleague, we do not find Fred Stewart's statement protected by Sec. 8(c), which precludes noncoercive speech from being deemed an unfair labor practice. Our colleague argues that Fred Stewart's statement "did not reasonably convey a threat," and emphasizes that the Respondent, in addition to urging the employees not to select the Union, assured them that "there would not be a problem" if they did so. Fred Stewart's statement is unlawful not because it threatened retaliation for supporting the Union. Rather, it is unlawful because it threatened that supporting the Union would be futile. There is no need to find that such a statement carries a warning of retaliation in order to find the statement unlawful. In any event, the Respondent's assurances against reprisal ring hollow in light of the Respondent's contemporaneous unfair labor practices, including its unlawful layoff of several employees because of their union activities.

[18] The judge, in the analysis portion of sec. II,B,4 of her decision, erroneously stated that, at the time of Vernon's alleged interrogation, Stewart had not revealed his union sympathies. Stewart, as the judge noted earlier in that section, had told Supervisor Tom Cron on July 29 that he had signed a union card when employee Jim Cherry had distributed them the previous day. Thus, in finding that Vernon's interrogation of Stewart violated Sec. 8(a)(1), we do not rely on the judge's statement that Stewart had not revealed his union sympathies.

[19] The judge variously placed Brown's layoff as occurring on July 28 and 29. We find that Brown's layoff occurred on July 29. Brown was not at work on July 28, so the Respondent waited until July 29 to inform him that he was laid off.

Counsel has the burden of showing that the employees' protected activity was a motivating factor in the Respondent's decision to lay them off. Once the General Counsel makes this showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.[21]

The judge found, and we agree, that protected union activity was a motivating factor in the layoffs. Thus, as a general matter, the Respondent was aware that the Union was interested in organizing the Respondent because, as mentioned above, on June 30, union organizer James Carsel and 9 other union carpenters applied for jobs and told the Respondent's president, Fred Stewart, that, if hired, they would try to organize the Respondent.[22] Further, on July 27, Carsel sent a letter to the Respondent stating that an organizing campaign was underway among its employees and that several of the Respondent's employees were working as "salts" for the purpose of organizing. Specifically regarding the employees who were laid off, Allison and Piazza engaged in protected activity on July 23 and the Respondent was aware of that activity. As noted above, on July 23 (which was a Wednesday), Allison and Piazza revealed their union membership to various employees and spoke about the Union. Allison identified himself to Foreman Ceruzzi as a union carpenter, stated that he intended to organize for the Union, and, in response to a question from Ceruzzi, identified Piazza as affiliated with the Union. Allison's and Piazza's layoffs the following Monday occurred just 3 working days after their July 23 protected activity. On and after July 18, Brown similarly engaged in protected activity of which the Respondent was aware. Thus, as noted above, on July 18, Brown told foreman Rucker that he was in the Union and tried to interest Rucker in joining the Union. Additionally, on July 29, Brown distributed union authorization cards to employees before work. Thus, Brown's layoff, like those of Allison and Piazza, came shortly after he engaged in protected union activity.

Further, as the judge found, various 8(a)(1) violations that the Respondent committed showed its antiunion animus. Indeed, the Respondent's unlawful motivation becomes clear when the layoffs are viewed in the context of the events that preceded them. Thus, in April, after "covert salts" had begun working for the Respondent, Foreman Ceruzzi twice unlawfully stated that there was one union member working for the Respondent and that the Union would never infiltrate the Respondent. On July 3, as discussed in section 4, above, Garlette, the Respondent's receptionist, violated the Act by telling job applicant Hackenberg, who was not affiliated with the Union, to backdate his application because union representatives had been in the office earlier that week. Thereafter, several "covert salts" working for the Respondent revealed their union affiliation, including, as mentioned above, Brown on July 18, and Allison and Piazza on July 23. On the latter date, Ceruzzi illegally interrogated Allison about whether other employees were in the Union and promulgated a discriminatory solicitation rule prohibiting employees from talking about the Union during working time. On July 25, Rucker unlawfully told Brown that Rucker could not talk about the Union or Fred Stewart would lay him off. On July 28, employee Jim Cherry announced that he was a union member and distributed authorization cards to other employees. Foreman Cron told Cherry that he had known that there was a salt on the crew but had not known it was Cherry. On July 30 or 31, Fred Stewart, the Respondent's president, told a meeting of employees that he was not going to join the Union and it was probably going to cost him some money, but he was not going to join, and that's where he stood, also in violation of Section 8(a)(1).

On the heels of this flurry of union activity—and only 3 days after Rucker told Brown that the Respondent's president would lay off Rucker if he talked about the Union—the Respondent, on July 28 and 29, laid off Allison, Piazza, Brown, and Phanelson, all of whom, except for Phanelson, had recently revealed their union affiliation and their interest in organizing the Respondent's employees. Viewing the layoffs in the context of these preceding events further supports the judge's finding that the General Counsel met his *Wright Line* burden of showing that the employees' protected activity was a motivating factor in the Respondent's decision to lay them off, as it underscores that the layoffs served to rid the Respondent of several employees intent on organizing the Respondent soon after they made the Respondent aware of their union ties and at a time when the Respondent had been made increasingly aware of the organizing effort within its work force.

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[20] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[21] Id. As the Board explained in *Regal Recycling, Inc.,* 329 NLRB 355, 356 (1999) (footnotes omitted):

> Under the test set out in *Wright Line*, in order to establish that the Respondent unlawfully discharged the . . . employees based on their union activity, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivating factor in the Respondent's decision to discharge. Thus, the General Counsel must show that the employees engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent demonstrated antiunion animus. Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

[22] As indicated above, the issue of the Respondent's refusal to hire and alleged refusal to consider for hire these 10 applicants is being remanded to the judge.

We also agree with the judge that, despite Phanelson's lack of union affiliation, the General Counsel met his burden under *Wright Line* of showing that the employees' protected activity was a motivating factor in the Respondent's decision to lay Phanelson off, as he worked closely with Brown, an open union advocate, and his layoff was necessary for the Respondent to adhere to its pretext that it was laying off shorter term employees to provide positions for longer term employees who were out of work. See *Robin Transportation*, 310 NLRB 411, 418 (1993); *JAMCO*, 294 NLRB 896, 905 fn. 7 (1989), enfd. 927 F.2d 614 (11th Cir. 1991), rehearing denied 932 F.2d 979 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991); *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), enfd. 782 F.2d 64 (6th Cir. 1986). ("The Board has held in the context of a union organizing drive that an employer's discharge of uncommitted, neutral, or inactive employees in order to 'cover' or to facilitate discriminatory conduct against a targeted union-supporting employee . . . is violative of Section 8(a)(3).")

We further find that the Respondent failed to demonstrate that it would have laid off Allison, Piazza, Brown, or Phanelson in the absence of protected union activity. The Respondent contends that it laid off Allison and Piazza on July 28 because the woodwork contractor on their project was behind schedule. However, on July 23, after employees had expressed concern about layoffs because the woodwork contractor was running late, the Respondent had reassured them that there would be plenty of work because they could weld and perform exterior sheetrock work until the woodwork contractor caught up. Additionally, as the judge noted, Allison and Piazza were laid off in the middle of a workday. Moreover, although the Respondent had three other construction projects underway at the time of Allison's and Piazza's layoffs, the Respondent did not reassign them to any other project, even though the Respondent had retained Allison since April and had transferred him from at least three other jobs, and Stewart, the Respondent's president, thought highly of Piazza's qualifications as well. Additionally, the Respondent retained other employees with less seniority at the time of Allison's and Piazza's layoff.

Similarly, as the judge found, the Respondent's stated reason for Brown's and Phanelson's layoffs, i.e., a purported desire to transfer long-term employees to the project, was also pretextual, as there was no showing that the Respondent typically laid off shorter term employees when longer term employees were out of work and one of the longer term employees reassigned to the project worked there only 1 day.[23] Additionally, as the judge noted, Phanelson was laid off in the middle of the day at a time when there still was work to be done on the project. Accordingly, as we find that the Respondent failed to demonstrate that it would have laid off Allison, Piazza, Brown, or Phanelson in the absence of protected union activity, we adopt the judge's findings that their layoffs were unlawful.

6. In her recommended Order, the judge ordered the Respondent to offer reinstatement to all four laid-off employees. However, as the judge recounts at the end of section II,B,9 of her decision, Brown resumed working for the Respondent on October 23. Although the Respondent subsequently laid Brown off again in early November, the General Counsel made clear at the hearing that he did not contend that Brown's November layoff was unlawful. We shall therefore modify the Order to omit the requirement that the Respondent offer reinstatement to Brown. We will, of course, retain the requirement that the Respondent make Brown whole for any loss of earnings and other benefits suffered as a result of his unlawful layoff, noting, however, that Brown's backpay period terminates as of October 23.

7. In section II,B,10 of her decision, the judge found that the Respondent violated Section 8(a)(4) and (1) by establishing a grievance and arbitration procedure restricting the rights of employees to use the processes of the NLRB. The judge found that the Respondent's counsel, by letter of July 29, informed the Union that if the Union or any of its members or supporters believed that their rights had been violated, the Respondent had arbitration provisions available to promptly resolve such disputes and that a grievance request form was attached. The judge further found that a voluntary grievance and arbitration procedure had been prepared by counsel. However, the judge found that neither the procedural guidelines nor the forms had been distributed to employees and that the grievance procedure had not been used. The judge noted that the current appli-

[23] The Respondent faults the judge's purported misstatement, in the last sentence of the fourth paragraph of sec. II,B,9 of her decision, that the Respondent contended that Brown was laid off because he was the "first person" on the job. However, the judge actually stated that the Respondent contended that Brown was the "last person" on the job, not the first one. The letter "a" was inadvertently omitted from the word "last," making it appear similar to the word "1st," spelled with a numeral. This was clearly a typographical error and not intended as meaning the word "first." In four of the five places where the judge actually used the word "first" in her decision, she spelled it out in letters. It appeared in numeric form only in fn. 14 of her decision, where, as required by proper citation form, it was used in a citation to a decision of the First Circuit. Moreover, in that instance, the letters "st" in "1st" appeared in superscript. The letters "st" are not in superscript in the word that the Respondent has misread as "first" in sec. II,B,9 of the judge's decision.

cation form referenced the grievance and arbitration (or "alternative dispute resolution") procedure and that some of the language on the form indicated that the procedure was voluntary, while other language appeared to indicate that the procedure was mandatory. In declaring the procedure unlawful, the judge found that, although no employee had utilized the procedure and it was uncertain whether the procedure was voluntary or mandatory, the Respondent had to bear the burden of this ambiguity, and the existence of such a mandatory procedure had a chilling effect on the exercise of Section 7 rights to seek access to the Union or to the NLRB processes.

We find that the record is factually insufficient to support a violation of the Act. The complaint alleged that about July 29 the Respondent established a grievance and arbitration procedure that restricted its employees' right to use the processes of the NLRB. The violation was alleged to have occurred about July 29 apparently because that was the date on which the Respondent, through its attorney's letter, informed the Union that the Respondent had a grievance and arbitration procedure. However, as the judge noted, the Respondent's grievance and arbitration procedure had never been used and the Respondent had never distributed the procedural guidelines and forms for it to its employees. Additionally, there is no evidence that the employees have been informed that the Respondent has implemented a grievance and arbitration procedure. Although the Respondent notified the Union of the procedure's existence, the Union was not the Respondent's employees' representative. Moreover, neither the Respondent's letter to the Union nor the attached grievance form indicated that the grievance and arbitration procedure was mandatory.

Further, the record indicates only one instance in which employees were given notice of the Respondent's grievance and arbitration procedure, and, at that time, the Respondent made it clear that the procedure was voluntary. Thus, at the informal hearing or "investigatory meeting" that the Respondent conducted on September 24 concerning employees Glen Easterly's and Don Stewart's suspensions, the Respondent asked Easterly and Stewart to complete new job applications.[24] The application forms that the Respondent gave Easterly and Stewart contained language about the Respondent's alternative dispute resolution (ADR) procedures, but the Respondent specifically advised Easterly and Stewart that the ADR was voluntary and that they were not required to sign the applications. Additionally, the Respondent added a sentence stating, "The ADR is voluntary," on the application given to Easterly, and the Respondent crossed out the ADR provision on the application given to Stewart. Moreover, as the Union admits in its brief, the application form that the Respondent used prior to September 24 contained no reference at all to an ADR procedure.

Additionally, although the judge's finding of a violation was based, at least in part, on the Respondent's application form and grievance and arbitration procedure in use at the time of the hearing, the record does not establish the then-current contents of that procedure. The evidence on this matter is based on the vacillating and confused testimony of Fred Stewart. While Fred Stewart testified that he "believed" that the Respondent's current application form included a reference to a grievance and arbitration procedure, he was uncertain whether a grievance and arbitration procedure document shown to him was the one referred to in the application form. He further testified that the Respondent had not utilized that grievance and arbitration procedure document and that, although it was Company policy, it was a "new thing" and he "[didn't] know that's all ironed out a hundred percent right now." He additionally testified that the Respondent was not using and had never used that document or given it to employees and that the Respondent had changed the grievance and arbitration policy that it was considering. He also testified that the application form that Easterly had filled out at the September 24 investigatory meeting was the current application form that the Respondent was using. As noted above, a sentence added to that form clearly specified that "[t]he ADR is voluntary." We cannot determine, on the basis of Fred Stewart's testimony, the content of the Respondent's grievance and arbitration procedure document in use at the time of the hearing. Further, his testimony tends to show that the application form in use at that time explicitly stated that "[t]he ADR is voluntary." Consequently, contrary to the judge, we find the record insufficient to show a violation based on the application form and grievance and arbitration procedure current at the time of the hearing.

The judge's overall rationale in finding a violation was based on the chilling effect that the Respondent's grievance and arbitration procedure had on the employees' exercise of their Section 7 rights to seek access to a union or to the NLRB processes. However, since it is unclear whether there was a grievance arbitration procedure in effect, or if there was, what the terms of that procedure were, and in the absence of evidence that employees could reasonably believe that the procedure, if it existed, was mandatory, we cannot infer that the Respondent had a grievance and arbitration procedure which had a chilling effect on the exercise of employees' rights. Because we find the record devoid of such evidence, we shall

[24] In sec. II,B,11, of her decision, the judge found Easterly's and Stewart's suspensions unlawful. We adopt that finding.

dismiss the 8(a)(4) and (1) complaint allegation involving the Respondent's grievance/arbitration procedure.[25]

8. In section II,B,12 of her decision, the judge found that the Respondent unlawfully interrogated employee Don Stewart during the Respondent's attorney's September 24 interview of Stewart following Stewart's August 7 suspension, purportedly for engaging in horseplay and unsatisfactory work quality and productivity. While the Board in *Johnnie's Poultry Co.,* 146 NLRB 770, 775 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965), afforded employers a limited privilege to question employees in preparation for unfair labor practice hearings, the judge found that the Respondent failed to abide by the safeguards established in that case to minimize the coercive impact of such questioning.[26] Thus, the judge found that the Respondent questioned Stewart about whether he was involved in union salting activity or any union activity and asked him when he signed a union authorization card, all without first assuring him that his participation in the interview was voluntary and that no reprisals would be taken against him. Additionally, the judge found that the questioning exceeded the scope of the interview, the stated subject of which was Stewart's suspension.

The Respondent contends that *Johnnie's Poultry* does not apply, because the focus of its interview was on Stewart's suspension and did not touch directly on the NLRB proceedings.[27] Assuming, contrary to the Respondent's contention, that *Johnnie's Poultry* does apply, we would agree with the judge that the Respondent's questioning of Stewart violated Section 8(a)(1), because, as the judge described, the Respondent failed to adhere to the safeguards which that case requires. On the other hand, assuming that, as the Respondent contends, *Johnnie's Poultry* is not applicable, we would nevertheless find that the Respondent's questioning of Stewart violated Section 8(a)(1), because it would constitute an unlawful interrogation under the *Rossmore House*[28] totality-of-the-circumstances test, the general test governing interrogations.

Thus, applying the factors of the *Rossmore House* test, set forth in section 3, above, we note that Stewart, who had been suspended by the Respondent, was questioned in the formal setting of an "investigatory meeting" held in the Respondent's office. The purpose of the meeting was to determine whether Stewart, as well as Easterly, who also had been suspended, would be offered reinstatement to their jobs despite their alleged horseplay and unsatisfactory work quality and productivity. Thus, at the outset of the meeting, the Respondent's attorney asked them to fill out new job applications. The questioning of Stewart was conducted by the Respondent's attorney and was done in the presence of the Respondent's president. Additionally, although Stewart was an open union supporter in that he had earlier told Foreman Cron that he had signed a union card, the Respondent's questioning of Stewart concerning union activity was nonetheless coercive, as it was not pertinent to the asserted reasons for his suspension and was raised in a context in which Stewart's job hung in the balance. Regarding the truthfulness of Stewart's reply to the questions at issue, Stewart initially denied that he was involved in union activity but, in response to additional questions, corrected his answer to state that he had signed an authorization card. Stewart's initial denial and subsequent correction betrayed his discomfort at being questioned regarding his union activity. Moreover, while the Respondent permitted Stewart to have union representatives with him during the investigatory meeting, that fact alone was inadequate to offset the otherwise coercive setting and conduct of the meeting.[29]

Accordingly, in sum, we find the Respondent's questioning of Stewart would be unlawful under the general test governing interrogations as well as under the standards of *Johnnie's Poultry*. Therefore, in adopting the judge's finding of a violation, we need not pass on whether *Johnnie's Poultry* applies under the particular circumstances of this case.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the

[25] As we find the record factually insufficient to support the violation, we do not reach the Respondent's contention that the violation should be dismissed because the Federal Arbitration Act, 9 U.S.C. §§ 1–16, authorizes arbitration of employment disputes.

[26] *Johnnie's Poultry* specified the following safeguards:

> [T]he employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place, and obtain his participation on a voluntary basis; the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

146 NLRB at 775.

[27] We also note that, at the time of the Respondent's questioning of Stewart, a complaint had not yet issued.

[28] 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[29] The Respondent's honoring of Stewart's right to be accompanied by a union representative under *Weingarten*, 420 U.S. 251 (1975), and *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), did not immunize the Respondent's otherwise unlawful interrogation of Stewart.

Respondent, Exceptional Professional, Inc. d/b/a EPI Construction, Nixa, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Informing its employees that it would be futile to select the Union as their bargaining representative, creating the impression among its employees that their union activities are under surveillance, promulgating a rule that discriminatorily prohibits employees from talking about the Union or any other labor organization while working, interrogating its employees about their union membership, activities and sympathies, and threatening its employees with layoff if they support the organizing efforts of the Union.

(b) Promulgating for discriminatory purposes a drug and alcohol abuse and testing policy as a term and condition of employment, requiring applicants to predate employment applications in order to avoid hiring union applicants, and laying off and suspending employees because of their union membership or activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(2) Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rule prohibiting employees from talking about the Union or any other labor organization while working and rescind its discriminatorily promulgated drug and alcohol abuse and testing policy.

(b) Make whole Charles Allison, Tom Piazza, Jerry Brown, Tim Phanelson, Glen Easterly, and Don Stewart for any loss of earnings and other benefits suffered as a result of Respondent's unlawful layoffs or suspensions as set forth in the remedy section of the judge's decision as modified here.

(c) Within 14 days from the date of this Order, offer Charles Allison, Tom Piazza, Tim Phanelson, Glen Easterly, and Don Stewart full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs or suspensions of Charles Allison, Tom Piazza, Jerry Brown, Tim Phanelson, Glen Easterly, and Don Stewart and, within 3 days thereafter notify the employees in writing that this has been done and that the layoffs and suspensions will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Nixa, Missouri, copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1997.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the issue of whether the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider for hire or to hire alleged discriminatees James Carsel, Larry Collinsworth, John Duncan, Roger Hensley, Bob Hurn, Mike Joyce, Tom McFarland, Matthew Rausch, Shelley Williams, and Steven Wilson, and the issue of an appropriate remedy for such violation, if found, are severed from the rest of this proceeding and remanded to the administrative law judge for appropriate action as set out above. The administrative law judge may reopen the record if necessary for the resolution of these issues.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision containing findings of fact, conclusions of law, and a recommended supplemental Order with regard to the issues remanded here. Copies of the supplemental decision shall be served on all parties, after which the provisions of

[30] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "Posted by Order of the National Labor Relations Board'' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Section 102.46 of the Board's Rules and Regulations shall be applicable.

CHAIRMAN HURTGEN, dissenting in part.

I join my colleagues in adopting the judge's decision, except as follows.

Contrary to the judge, I do not find that Fred Stewart, the Respondent's president, violated the Act by stating to employees on July 30 or 31 that he "was not going to join the Union and it was probably going to cost him some money, but he was not going to join and that's where he stood." This is no more than an expression of Stewart's opinion that he did no want a union at his place of business, and that he was prepared to shoulder the costs of opposing the Union's campaign. Stewart's expression of opinion was not coercive and did not reasonably convey a threat of reprisal if employees selected the Union. As such, it was protected by Section 8(c). Nor did Stewart express a threat of futility. He did not say that bargaining would be futile if the Union were selected as the representative. He said that Respondent would oppose the Union's campaign to become that representative. Moreover, while employees received from the Respondent a letter simply urging them not to select the Union, Stewart assured them that "there would not be a problem" if they did so.

In an effort to establish that Stewart's statement was unlawful, my colleagues have essentially listed unfair labor practices by others. However, absent a demonstrated nexus, I would not hold that this other conduct renders unlawful Stewart's otherwise lawful statements.[1]

Accordingly, I do not believe that employees could reasonably have understood the Respondent to be threatening the employees in any way. I would reverse the judge's unfair labor practice finding.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT tell you that it is futile to select Carpenters' District Council of Kansas City and Vicinity Locals 311 and 978, affiliated with United Brotherhood of Carpenters and Joiners of America, or any other Union, as your bargaining representative.

WE WILL NOT create the impression among you that your union activities are under surveillance.

WE WILL NOT promulgate a rule that discriminatorily prohibits you from talking about the Union or any other labor organization while working.

WE WILL NOT interrogate you about your union membership, activities, and sympathies.

WE WILL NOT threaten you with layoff if you support the organizing efforts of the Union.

WE WILL NOT promulgate for discriminatory purposes a drug and alcohol abuse and testing policy as a term and condition of employment, require applicants to predate employment applications in order to avoid hiring union applicants, or lay off or suspend you because of union membership or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our unlawful rule prohibiting you from talking about the Union or any other labor organization while working and rescind our discriminatorily promulgated drug and alcohol abuse and testing policy.

WE WILL, within 14 days from the date of the Board's Order, offer Charles Allison, Tom Piazza, Tim Phanelson, Glen Easterly, and Don Stewart full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Charles Allison, Tom Piazza, Jerry Brown, Tim Phanelson, Glen Easterly, and Don Stewart whole for any loss of earnings and other benefits resulting from their layoffs or suspensions, less any net interim earnings, plus interest, provided, however, that the backpay period for Jerry Brown ceases as of October 23, 1997.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs and suspensions of Charles Allison, Tom Piazza, Jerry Brown, Tim Phanelson, Glen Easterly, and Don Stewart, and WE WILL, within 3 days thereafter,

[1] My colleagues rely particularly on a comment by Foreman Ceruzzi that "the Union will never infiltrate EPI." This statement is not coercive. It is a prediction by Ceruzzi that the Union would not become the representative of Respondent's employees.

notify each of them in writing that this has been done and that the layoffs will not be used against them in any way.

EXCEPTIONAL PROFESSIONAL, INC. d/b/a EPI CONSTRUCTION

Stanley D. Williams, Esq., for the Acting General Counsel.
Donald W. Jones, Esq. (Hulston, Jones, Gammon & Marsh), of Springfield, Missouri, for the Respondent.
Michael T. Manley, Esq. (Blake & Uhlig), of Kansas City, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Springfield, Missouri, on November 18–21, 1997, and March 24–26, 1998. The charge in Case 17–CA–19272 was filed by Carpenters' District Council of Kansas City and Vicinity Locals #311 and #978, affiliated with United Brotherhood of Carpenters and Joiners of America (Local 311, Local 978, or, jointly, the Union) on July 16, 1997,[1] and amended on August 27 and September 29. The charge in Case 17–CA–19325 was filed by the Union on August 27 and amended on September 29. The charge in Case 17–CA–19385 was filed by the Union on September 25. The second consolidated complaint, issued October 30, alleges that Exceptional Professional, Inc. d/b/a EPI Construction (Respondent) committed numerous violations of Section 8(a)(1) and (3) of the Act.[2]

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by counsel for the Acting General Counsel, for the Charging Party, and for Respondent, I make the following

I. FINDINGS OF FACT

Respondent, a corporation, maintains an office and place of business in Nixa, Missouri, where it is engaged in the construction industry as a sheet rock installation contractor. During the 12-month period ending August 31, Respondent performed services valued in excess of $50,000 in States other than the State of Missouri and purchased and received goods valued in excess of $50,000 from other enterprises located within the State of Missouri, which other enterprises had received these goods directly from points outside the State of Missouri. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Although Respondent initially denied that the Union is a labor organization within the meaning of Section 2(5) of the Act, Respondent thereafter amended its answer to admit the Union's 2(5) status without waiving its affirmative defenses.[4] Accordingly, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

Respondent, a nonunion contractor, was targeted by the Union for salting activities. Beginning in April, "covert" salts concealed their union affiliation at the time they applied for employment with Respondent. On the other hand, in late June, "overt" salts applied for employment announcing that their intention, if hired, was to organize Respondent's employees as well as provide quality work for Respondent. Fred Stewart is the president of Respondent. Tom Cron is one of the working foremen employed by Respondent. Respondent agrees that both Stewart and Cron possess supervisory authority within the meaning of Section 2(11) of the Act. The supervisory status of other individuals employed as working foremen is in dispute. During the relevant time period, Respondent performed dry wall subcontracting for approximately 15 construction sites in the Springfield, Missouri, and surrounding area.

B. Facts

1. Supervisory or agency status of working foremen

Respondent's working Foremen Steve Ceruzzi, Randy Rucker, and Mike Vernon are alleged to have made various statements in violation of Section 8(a)(1). Before turning to the merits of these substantive allegations, it is necessary to determine whether statements of the working foremen may be attributed to Respondent. If these working foremen are either supervisors or agents of Respondent, as alleged, Respondent is responsible for their statements.

[1] All dates are in 1997 unless otherwise indicated.

[2] Sec. 8(a)(1) of the Act provides in relevant part that employers who interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Sec. 7 of the Act are guilty of an unfair labor practice. One specific Sec. 7 right at issue in this case is employees' right to organize for their mutual aid and protection. Sec. 8(a)(3) of the Act creates an unfair labor practice when an employer discriminates against employees because they availed themselves of Sec. 7 rights.

[3] Credibility resolutions have been made based on a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[4] Respondent asserts that the Union should be disqualified to act as a labor organization with respect to Respondent because a pattern and practice of activities by the Union indicates that the Union is seeking to extort funds from Respondent in violation of Sec. 302 of the Act and, additionally, Respondent asserts that the Union should be disqualified because it is attempting to force Respondent to grant it assistance to organize Respondent's employees. I reject these arguments. Respondent's position is essentially that the Union's salting program is a violation of Sec. 302 and Sec. 8(a)(2). Sec. 302 restricts, inter alia, payments to union representatives except as compensation for services as an employee. The only payment to union representatives involved in this case falls into the exception rather than the rule. Sec. 8(a)(2) prohibits domination or interference with the formation or administration of any labor organization or contribution of financial or other support. However, pursuant to Sec. 8(f), an employer engaged primarily in the building and construction industry may make an agreement covering employees without violating Sec. 8(a)(2). Although there is no evidence that the Union requested Respondent to sign a prehire agreement, had it done so, there would be no violation.

The term supervisor is defined in Section 2(11) of the Act as,

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(13) of the Act provides, "In determining whether any person is acting as an agent of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." Common law principles of agency are utilized in determining agency status. *Longshoremen ILA (Coastal Stevedoring Co.),* 313 NLRB 412, 415 (1993), remanded 56 F.3d 205 (D.C. Cir. 1995). The common law principles of agency incorporate the concepts of apparent and implied authority.

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the act in question. *NLRB v. Donkin's Inn,* 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.,* 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Restatement 2d, Agency § 27 (1958 Comment). Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity.

Dentech Corp., 294 NLRB 924, 925 (1989), quoting *Service Employees Local 87 (West Bay Maintenance),* 291 NLRB 82 (1988); see also *Great American Products,* 312 NLRB 962, 963 (1992). Accordingly, the test is whether, under all the circumstances, "the employees would reasonably believe that the individual was reflecting company policy and acting on behalf of management." *Zimmerman Plumbing Co.,* 325 NLRB 106 (1997). The Acting General Counsel, as the party asserting the agency status, must bear the burden of proof on the issue.

Respondent's working foremen receive their instructions directly from Stewart or Cron. During the bulk of each project, the working foreman is Respondent's only presence on the job. The working foremen deal with the general contractor and keep the crew busy during the day. Stewart testified that his working foremen's duties included giving instructions to the crew, keeping track of hours worked by the crew, ensuring that the crew is performing to acceptable standards, correcting substandard work, and assigning tasks. In explaining the difference between Cron, an admitted supervisor, and other working foremen, Stewart stated that Cron could settle personnel problems without consulting Stewart but the other working foremen could not do so.

Stewart has several jobs in progress at any one time and, accordingly, his time on the jobsites is limited. He relies on the working foremen to assign work to employees, correct inadequate work, and deal with the general contractors. He testified that he typically requested information from all of his working foremen regarding performance of specific individuals, usually new hires, in order to ascertain if the employee was performing adequately. In other words, Stewart explained, after an employee has worked for awhile, Stewart would ask the working foreman on the job, "Is he any good or not?" Stewart would then utilize this information to decide whether to retain the employee, whether to give a wage increase, or whether to assign the employee to another project when work at the current project ceased or to lay the employee off.

Ceruzzi, who was utilized as a working foreman on several projects, testified that he did not set company policy, hire or fire employees, make decisions to transfer employees from one project to another, make decisions to issue warning or suspensions, make decision to lay off employees, make recommendations for promotions or pay increases, or settle grievances. He testified that his job consists of taking a set of blue prints and following the layout. He contacts Fred Stewart with any questions. During the day, he frames and lines the crew out in the direction called for in the prints. He keeps time records and has the keys to the gang box. Ninety-five percent of his work is with his tools. The other 5 percent he spends taking care of problems on the project. He does not decide who to lay off. He does not select the suppliers. He receives $1 more than journeyman rate as working foreman. He does not take part in management meetings to determine what jobs to bid. On August 1, he attended a meeting with Respondent's counsel in which he was told not to interrogate, threaten, promise, or spy on union activity.

When covert salt Charles Eugene Allison was hired for the James River project, Fred Stewart told Allison to report to Steve Ceruzzi, working foreman, who, according to Stewart, was, "running the job out there." Ceruzzi gave Allison his work assignments, checked his work, and handled time and attendance records for the job.

Allison's next job was in Overland Park, Kansas, at Santa Fe Trail and Tomahawk Elementary schools. Steve Ceruzzi was in charge of this work as well. According to Allison, Ceruzzi instructed employees regarding assignments, kept time and attendance records, distributed meal allowances to employees, and paid their hotel bills. Ceruzzi also sent two employees home who reported to work under the influence of alcohol and granted one employee, Allison, a day off.

For 1 week, Allison substituted for Ceruzzi on the Overland Park jobs. Before leaving Springfield for this week in Overland Park, Allison met with Stewart who gave him a check for food and gas expenses and also asked Allison to take the blueprints with him and run the job. Stewart also gave Allison a list of supplies that were needed and a corporate credit card to pay for them. On arriving in Overland Park, Allison was unable to assign work to his crew because the demolition team had not performed its preparatory work. Allison contacted BCE, the

general contractor, and asked if Respondent's crew could perform the demolition work so that the project would be ready for rebuilding on the following shift. BCE approved this.

Working Foreman Mike Vernon testified that he did not make decisions regarding transfer, discipline, layoff, or suspension. Further, Vernon did not make recommendations to suspend, promote, or for wage increases. He testified that he did not settle grievances or recommend suppliers. He agreed that he kept daily time records for his crew. Vernon felt the only difference between his job and a crew job was that he unlocked the gang box, told the men what to do based on Fred Stewart's instructions, and at the end of the day, he made sure of the tools were secured, and kept time records. The rest of the time, he estimated about 90 percent of the time, he was working with his tools. He received $1 per hour more as working foreman than as a journeyman. He further testified that he did not pledge the credit of Respondent or make purchases for Respondent. He did not attend management meetings in which bids or job assignments were discussed.

The parties acknowledge that there is little testimonial dispute regarding the duties of the working foremen. Counsel for the Acting General Counsel and counsel for the Charging Party rely on evidence that the working foremen assign work based on their knowledge of the employees' skills and abilities in utilizing independent judgment, insure that work is completed in a timely and professional manner, independently correct unsatisfactory work, keep track of hours, and effectively recommend retention of new employees and eligibility for rehire. They also note the $1 per hour pay differential and the fact that working foremen sometimes sign separation notices on the "supervisor" signature line.

Respondent argues that the working foremen are leadmen and not statutory supervisors. Respondent initially notes that working foremen do not have the authority to hire or fire. Respondent also asserts that working foremen do not exercise independent judgment but merely give directions based on existing company practices and policies. Finally, Respondent relies on the fact that the working foremen spend the majority of their time working with tools.

Based on the evidence recited above, I find that Ceruzzi, Rucker, and Vernon were supervisors and agents of Respondent while acting as working foremen. They served as the sole spokespersons for Respondent on the jobsites and directed the work of employees exercising considerable independent judgment. Fred Stewart testified that their duties included ensuring that the crew was performing to acceptable standards and correcting substandard work. The working foremen authorized time off from the job and were also authorized to suspend employees who reported to work inappropriately. Their assessments of employees' performances were accepted by Fred Stewart without further investigation, thus constituting effective recommendations. Based on these assessments, Fred Stewart determined whether to grant pay increases or retain employees. Based on this evidence, I conclude that the working foremen were empowered to responsibly direct the work force in the interest of Respondent utilizing their independent judgment. Moreover, I find that by reporting their observations to Fred Stewart, who performed no further evaluation, the working foremen effectively recommended whether employees were retained and whether employees received pay increases. These duties are sufficient to constitute the working foremen as supervisors. It is not necessary that they possess each of the criteria listed in Section 2(11).

Moreover, were the working foremen not statutory supervisors, I would nevertheless find that their statements were attributable to Respondent. All communications from Fred Stewart to employees were channeled through the working foremen. They informed employees regarding layoff or reassignment. Fred Stewart held them out to employees and general contractors as the person "in charge" of their particular projects. I conclude, under these circumstances, that employees would reasonably believe that they reflected company policy and acted on behalf of Fred Stewart. I therefore find that each of these working foremen possessed actual and apparent authority to act for Respondent at the relevant times alleged in the complaint.[5]

2. Allegedly informing employees that it would be futile to select the Union and creating the impression of surveillance

Ceruzzi, early to mid-April, at the James River Power Plant—Respondent worked at the James River Power Plant, located near Springfield, Missouri, in early to mid-April. Steve Ceruzzi, Respondent's working foreman for that project, spoke with general contractor BCE's superintendent in the presence of Charles Eugene Allison, a covert salt, in the context of discussing a "deal" the Union had against BCE. Allison testified that Wright, the BCE superintendent, told Ceruzzi to, "watch his back because the union is supposed to be out for these companies." According to Allison, Ceruzzi responded, "We don't have to worry about that . . . Fred is a lot smarter than that and the union will never infiltrate EPI." Allison also recalled that Ceruzzi told Wright that EPI had one union member working for them at the time because the unions did not have any work.

Ceruzzi denied that he was aware of an NLRB case brought by the Union against BCE and, although he interacted with Wright, he denied that they conversed about union infiltration. However, Ceruzzi agreed that he was aware that the Union was picketing BCE on the James River project and was aware that one union member was working for Respondent.

Ceruzzi, late April, at an Overland Park, Kansas jobsite—In late April, during a break in which working Foreman Ceruzzi and employees Allison, Justin Turnbaugh, Tom Piazza,[6] Jesus Padron, and Danny Nagera were engaged in various conversations, Allison overheard Ceruzzi say that the Union would never infiltrate EPI. Piazza also overheard this remark, recalling that Ceruzzi said Respondent knew there was, "a guy from the Union in the company and that there was no way in hell the Union was going to infiltrate this company." Ceruzzi denied making these or similar remarks and stated that he had no idea there was any union on the scene while he was on this project.

[5] Allison, an alleged discriminatee, acted as working foreman on one project. He was accorded special trust on this project and, were it necessary, I would find that he was an agent of Respondent during the week he acted as working foreman.

[6] Piazza was a covert salt. Allison recommended Piazza to Fred Stewart.

Stewart, July 30 or 31, at a Carthage, Missouri jobsite—Fred Stewart conducted a meeting for all employees at the Carthage elementary school jobsite in the parking lot on the day following distribution of authorization cards on that project. According to Don Stewart (no relation to Fred Stewart), Glen Easterly, James Cherry, and others, Fred Stewart told the employees that he was not going to join the Union and it was probably going to cost him some money, but he was not going to join and that's where he stood. Easterly recalled that Fred Stewart said there were two sides to the union issue and he was available to answer employees' questions in order to try to make things run as smoothly as possible. Easterly also recalled Fred Stewart saying, "if the wheel's not broke we're not going to fix it" and he was not going to go union.

Employees also received a letter from Respondent regarding unions and their use of authorization cards as well as organizational techniques. The letter urged employees not to sign authorization cards because it, "signs away to the Union your right of choice of representation." Both Cron and Fred Stewart assured employees that there would not be a problem if they had engaged in union activity. Fred Stewart denied that he told employees there would be a change in policies or that he was going to clamp down on policies or that he made any antiunion remarks.

Credibility—Allison was an extremely solid witness. His recollection and consistency on cross-examination were excellent. Although Ceruzzi displayed a sincere demeanor, of the two witnesses, I credit Allison over Ceruzzi on the allegations regarding futility of organizing. Piazza was also a solid, consistent witness and I credit him over Ceruzzi regarding the allegation of futility of organizing and impression of surveillance. This is based in part on their relative demeanors and also based in part on the inherent probability that, knowing of the picketing and the Union's interest in organizing nonunion construction employers, Ceruzzi, who admitted speaking of the Union, could have made such comments. Based on the recollections of Cherry, Easterly, and Don Stewart, as well as Fred Stewart's testimony, I find that Fred Stewart told employees he would never be union and it would probably cost him some money.

Arguments—Counsel for the Acting General Counsel and counsel for the Charging Party assert that Ceruzzi's remarks restrained and coerced employees by indicating to employees that efforts to unionize were futile and that Respondent was taking note of employees who might be union adherents. They argue that Fred Stewart's comments to employees also impermissibly conveyed futility and gave the impression that regardless of the extent of employees support, Respondent would never agree to sign a union contract. Respondent asserts that even if Ceruzzi and Stewart are not credited, no violation should be found because the statements are protected by Section 8(c) of the Act. Respondent relies particularly on Fred Stewart's statement that employees would not be discriminated against. Moreover, Respondent argues that the alleged statements are isolated and, for that reason, do not support an unfair labor practice finding.

Analysis—Statements are violative of the Act if they reasonably tend to interfere with, restrain, or coerce employees in the free exercise of their rights under the Act. *Reeves Bros.,* 320 NLRB 1082 (1996). In assessing the credited evidence, I have taken into account the economic dependence of employees on their employers with awareness of an employee's attentiveness to intended implications of his or her employer's statements which might be more readily dismissed by a disinterested party. See *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617 (1969).

On balance, I find the statements were not protected by Section 8(c) of the Act, were not isolated, and consequently, violative. Ceruzzi's statement that no union was going to infiltrate Respondent is similar to statements that a company will never be unionized. Such statements restrain employee organizational rights as they indicate the futility of pursuing unionization. See, e.g., *Wellstream Corp.,* 313 NLRB 698, 706 (1994) (no "son of a bitch" would bring a union into the company and employer would see to it that company was never unionized). Although Stewart's statement that he did not want to be union, standing alone, might not be a violation,[7] when coupled with his assertion that this might "cost him some money," I conclude that employees would clearly be threatened that unionization would be futile. See, e.g., *Basic Metal & Salvage Co.,* 322 NLRB 462, 464 (1996) (statement that employer would fight to the end and did not need a "f" union unlawfully conveyed futility of organizing).

Ceruzzi's statement that he knew there was one union member working for EPI logically indicated to employees that their union activities were under surveillance. Such statements tend to interfere with employees' free exercise of the right to organize. See, e.g., *Royal Manor Convalescent Hospital,* 322 NLRB 354, 362 (1996) (manager's statement that he knew Gates had started the Union created impression of surveillance); *Jordan Marsh Stores Corp.,* 317 NLRB 460, 465 (1995) (manager's statement that he knew there were 12 to 15 employees at the union meeting constituted creating the impression of surveillance).

3. Alleged promulgation of discriminatory solicitation rule

Ceruzzi, July 23, Springfield, Missouri—On July 23, Allison and Piazza revealed their union membership to various employees and spoke about the Union, while they were working, to employees in their vicinity.[8] In the afternoon, while speaking with two employees about his union affiliation, Allison asked Ceruzzi to join the conversation. Allison identified himself to Ceruzzi as a union carpenter and stated he intended to organize for the Union. Ceruzzi asked Allison whether any other employees were with the Union. Allison replied that Tom Piazza and Dan Joiner were also with the Union. According to Allison, Ceruzzi told Allison he could speak to employees on

[7] See, e.g., *Hampton Inn,* 309 NLRB 942 (1992) (statement that employer did not want union because it did not have any money and trying to get money from employer was like trying to get water from a stone merely expressed employer's financial position and, without more, did not convey that employees' efforts would be futile).

[8] Allison explained that he waited to reveal his union membership from the time he was first employed in mid-April until July so that his work could be evaluated as good and in order to create friendships with coworkers. Piazza explained that the Union requested that he keep his membership a secret until instructed otherwise.

break or at lunch but not during working time. Prior to this, Allison believed employees could talk about anything at all while working as long as they continued to perform their jobs.

Ceruzzi agreed that he asked Allison whether there were other union employees on the job. However, he disagreed regarding the context of his admonition to Allison to keep his union activities limited to breaks or lunch. Ceruzzi testified that this admonition was directed only to circulation of authorization cards.

Credibility—As to the explanation given by Ceruzzi regarding whether his admonition of working time versus nonworking time as applied to conversations or distribution of authorization cards, I find Allison's testimony more believable and more inherently probable.

Arguments—Noting that employers may lawfully prohibit solicition or discussion of union matters during working time, counsel for the Charging Party nevertheless argues that in this instance, the timing and implementation of the "no-talking" rule was in direct response to employees' union activity and is thus violative. Counsel for the Acting General Counsel argues that Ceruzzi's admonition to Allison was designed to coerce employees into foregoing discussions about the Union. Respondent relies, in general, on its assertion of free speech and the isolated nature of any alleged violations.

Analysis—Reasonable restrictions on solicitation are not automatically invalid simply because they are promulgated during an organizational campaign. However, the employer must show that its new policy was justified by a substantial work disruption. *McCullough Environmental Services,* 306 NLRB 345, 356–357 (1992), enfd, 5 F.3d 923 (5th Cir. 1993). Prior to Ceruzzi's limitation to Allison, there was not a "no-talking" or no-solicitation rule. I find that the rule, which was clearly addressed only to talk about the Union, was implemented for discriminatory purposes and violated the Act.

I grant counsel for the Acting General Counsel's request that an allegation of interrogation be added regarding Ceruzzi's admitted question to Allison regarding whether other employees were members of the Union.[9] This allegation will be treated in the immediately following section.

4. Alleged interrogation

Cron, July 29, Carthage Elementary School—Covert salt Jim Cherry distributed authorization cards at the Carthage, Missouri Elementary school jobsite on July 28. On the following morning, working Foreman Cron asked covert salt Don Stewart and his partner covert salt Glen Randall Easterly if they had signed cards. Don Stewart replied that he had. Cron said, "do you know that you joined the Union?" and Don Stewart replied that he had not joined, that the card was only for legal representation. Cron disagreed and told Don Stewart he had joined the Union and he better get his card back. Easterly also responded affirmatively that he had signed a card. Easterly recalled that Cron had a clipboard with him and asked if Easterly had any idea how many union salts were inside EPI. Easterly refused to say. Cron asked if a rough estimate of 14 would be accurate and Easterly responded that it would.

Cron recalled a conversation with Don Stewart. Cron remembered Don Stewart telling him that he had signed a union card when Cherry distributed them. However, according to Cron, Don Stewart volunteered that a friend of his was a lawyer for Prime Trucking and told him that he could get his card back at any time. Cron testified that he did not interrogate Don Stewart. Rather, Don Stewart volunteered that he had signed a card and Cron did not tell him he should get his card back.

Vernon, August 4, Fairview Elementary School—On August 4, at the Fairview Elementary school jobsite in Carthage, Missouri, working Foreman Vernon told Don Stewart and Easterly that he could not say anything about the Union, for or against it, but personally, the Union had never done anything for him. Then Vernon grabbed Easterly's shirt pocket and asked if there was a tape recorder. This comment was treated as a joke by Don Stewart and Easterly. However, according to Easterly, Vernon twirled him around and patted him down and he told Vernon, "that's enough." Easterly also recalled that Vernon asked why they were trying to steal "our" jobs. Easterly responded that the intent of the program was not to steal jobs. Easterly testified that he told Vernon they were at EPI as Union salts to try to educate employees who wanted information about the Union. Easterly recalled specifically speaking with Vernon about wages, health and welfare, and retirement programs, to which Vernon responded that he did not need a retirement program, he would take care of his own retirement.

Vernon testified that Cron told him that Easterly was tape recording conversations. However, Vernon denied that Cron associated this with the Union. Vernon recalled an incident where he said something he would not have wanted his wife to hear and he teased Easterly about getting him in trouble by tape recording the statement. Vernon also testified he attended a meeting with Respondent's counsel on August 1 and knew that there was interest in a Union among employees. He had been told that he could not threaten, interrogate, promise, or spy.

Credibility—Cron and Fred Stewart have been friends since elementary school and business associates for at least 20 years. Despite this close relationship, Cron did not impress me as a witness who was telling anything but the truth. His emotional tone was fresh in reacting to questions and his recollections were good. Vernon, on the other hand, was not a particularly strong witness. During his brief time on the witness stand, he indicated a lack of candor and experience with unionization because, as he stated, he was from Texas and they had no unions there. Easterly, who displayed total loyalty to the Union, was a weak witness who exhibited open animosity toward Respondent's counsel. However, Don Stewart, who was on the witness stand for about 4 hours, maintained a fairly respectful demeanor and, if he showed any weakness, it was in the appearance of extensive preparation. On balance, as between Cron, and Don Stewart, I credit Cron and find that he did not ask Easterly and Stewart whether they had signed union cards and how many salts there were on the job. I note in particular that there is no explanation as to why Easterly could recall Cron having a clipboard and asking the number of salts on the job while Don Stewart did not testify to such questioning. As be-

[9] This allegation of interrogation is not alleged in the complaint. However, it is closely related to other allegations in the complaint and was fully litigated at the hearing. Accordingly, it is appropriate to consider the interrogation as part of the case.

tween Vernon, Easterly, and Don Stewart, I credit Easterly and Don Stewart and find the Vernon asked them about stealing jobs. There is no credibility conflict between Allison and Ceruzzi regading this allegation of interrogation.

Arguments—Counsel for the Charging Party and for the Acting General Counsel argue that the questioning was coercive while counsel for Respondent asserts that any questioning was free of coercion, isolated, and innocuous.

Analysis—Interrogation is not, by itself, a per se violation of Section 8(a) (1). Interrogation is coercive if, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide,* 309 NLRB 185, 187 (1993). Under this totality of circumstances approach, such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation are examined. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

At the time of Vernon's questions, Easterly and Don Stewart had not revealed their union sympathies. Cf. *Rossmore House,* 269 NLRB 1176, 1177 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). They were questioned about stealing jobs and admonished to get their cards back by their immediate supervisors. Under these circumstances, I find the questioning violative of the Act. As to Ceruzzi's questioning of Allison regarding whether there were other union members on the job, I similarly conclude the question tended to restrain employee organizational activity. Although Allison had revealed his own union membership, he was questioned about the activities of others rather than his own activities and sympathies. Such questioning goes beyond the allowable boundaries.

5. Threat of layoff

Rucker, July 25, Carthage, Missouri—On July 18, covert salt Brown spoke with working Foreman Rucker at break stating, "well, you know, I'm in the union and, you know, we need people like you." Brown gave Rucker the phone number at the Union hall and told him to contact business agent Danny Hyde. On July 25, Brown asked Rucker if he had called the Union hall. Rucker responded that he could not talk about the Union on the job or Stewart would lay him off.[10] On July 29, Brown handed out union authorization cards to employees before work. Rucker laid Brown off that day.

Credibility—Rucker did not specifically deny stating to Brown on July 25 that he could not talk about the Union on the job or Stewart would lay him off. Rucker testified that he was unaware of a policy requiring layoff for distribution of union cards. Under these circumstances, I credit Brown's testimony.

Arguments —Counsel for the Acting General Counsel claims that Rucker's statement to Brown was inherently coercive because an employee would react with fear on hearing that the working foreman could not discuss unionization on the job without being laid off. Counsel for the Charging Party asserts that Rucker's statement reasonably tended to interfere with Section 7 rights regardless of the presence or absence of any subjective feelings of threat. Respondent argues that Rucker himself was a union supporter and, accordingly, any statement he might have made could not be coercive.

Analysis—Regardless of whether Rucker showed any interest in joining the Union, I have found that he told Brown that he could not talk about the Union on the job because he would be laid off. By making such a statement, Rucker unlawfully threatened layoff if employees spoke about the Union while at work.

6. Refusal to consider for hire or to hire

Facts—James Carsel, organizer for Kansas City Carpenters' District Council, visited Jerry Hill of Dalton Killinger at the Carthage, Missouri HH Highway Elementary school site on June 22 or 23. Hill introduced Carsel to Cron of Respondent. Carsel asked Cron if he was, "hurting for help." Cron stated that he needed help and Carsel offered to send him good people. Cron said that anyone interested would have to apply with Fred Stewart in Nixa.

On June 23, John Patrick Duncan and Roger Hensley, covert salts, went to an elementary school construction site in Carthage, Missouri, in search of the sheetrock subcontracor's foreman in order to apply for jobs. While waiting for Tom Cron, the foreman, to finish a telephone call, Duncan overheard Cron state that he had a lot of work and needed more employees. When Cron completed his call, Duncan and Hensley told him they were there to apply for work. Cron stated that he had just been speaking to the owner, Fred Stewart, and Duncan and Hensley would have to go to his office in Nixa, Missouri, to apply for jobs because Cron did not have any application forms.

On June 25, Gerald Hill, job supervisor for Dalton Killinger at the Carthage, Missouri HH Highway Elementary school, was ready to start ceiling work. EPI did not have a sufficient number of sheetrockers to meet his demands. Hill volunteered some of his crew to help EPI. This help was supplied from June 26 to July 30. Although Cron disagreed with Hill's testimony on this matter, testifying that he actually was overstaffed and took the Dalton Killinger crew as a favor to Hill, I credit Hill, a disinterest third party, over Cron.

On June 30, Carsel and other union carpenters,[11] arrived at the Nixa, Missouri offices of EPI. Carsel introduced himself as an organizer for Local 311 and 978 and told Fred Stewart that he had a lot of qualified carpenters and asked for applications. Carsel told Stewart that if the applicants were hired, they would try to organize his company. Stewart initially said he did not need any help. However, when Carsel told Stewart he had spoken to Cron, who said EPI was behind on the Carthage Elementary school on HH Highway, Stewart replied, "fine," and him handed all the applicants forms to complete. When the applications were completed and returned to Stewart, he told the group it would be about 2 weeks before he would be able to contact anyone.

[10] Respondent objected to this testimony as hearsay. Rucker is alleged to be a supervisor within the meaning of Sec. 2(11). However, I agreed that this evidence was admitted subject to proof of his status as a supervisor.

[11] These individuals were Steven Wilson, Shelly Williams, Larry Collinsworth, Mike Joyce, Matthew Rausch, Thomas McFarland, and Bob Hurn. In addition, Duncan and Hensley accompanied the group.

Stewart testified that it was impossible to look at the applications of the batch applicants at the time of their submission because he was busy with other tasks.[12] He also explained that he did not need any help at the time. When he did review the applications at a later date, he determined that only one or two of the applicants had any relevant work experience. Of those with relevant work experience, the experience was of short duration and not recent. Stewart testified that he did not refuse to consider any of them because they did not list the dates of their former employment or fully complete the education section.

Although Stewart hired employees between June 30, the date of the batch applications, and mid-July and he considered the batch applicants at that time, he felt that the employees he hired during that period were better qualified than any of the batch applicants. Moreover, Stewart did not believe these applicants were serious about obtaining work with him. "I didn't know why they all came in, to be honest, I thought there was something up about it, but I wasn't sure." Stewart admitted that if Respondent were Union, it would be tougher to compete and he would rather not be Union. When the Union came on the scene, he told employees that they were salts and spies. He warned employees to be on guard and be sure that they were not subjected to problems because of "these Union people."

Credibility—Interestingly, there are really no material credibility disputes regarding this issue. Respondent agrees that the applicants completed their applications and made their union affiliation known. Respondent claims it did not have time to consider the applicants at the time of submission of the applications but, when it took the time, found the applicants were not as qualified as other applicants. The parties disagree regarding whether there were vacancies at the time of the applications. However, I find this disagreement is not material because the facts unequivocally indicate that Respondent hired 13 employees shortly after the batch applications were submitted and also utilized 4 employees from its general contractor from June 25 until July 30.

Arguments—Counsel for the Charging Party notes that the record, "is replete with evidence of . . . animus towards active union members." In addition to the statements which are found to constitute 8(a) (1) violations, Charging Party also notes that Respondent campaigned against unionization. Counsel for the Acting General Counsel and the Charging Party also argue that Respondent's proffered reasons for not hiring the batch applicants are "transparently false" and "pure pretext," respectively. In addition to arguing that no prima facie case was made due to absence of animus, counsel for Respondent also argues that there were no jobs available for the potential discriminatees because their experience was inadequate and they were not, "serious job applicants with recent employment experience.[13]

Analysis—The framework for analysis[14] in cases turning on employer motivation requires first that counsel for the Acting General Counsel show sufficient evidence to support the inference that protected conduct was a "motivating factor" in the employer's decision. Typically, this may be proved by evidence of union activity, employer knowledge of this activity, employer animus toward this activity, and timing. Once this is established, the employer's burden is to persuade, by a preponderance of the evidence, that it would have taken the same action even in the absence of the protected conduct.

Failure to consider a job applicant for hire or failure to hire a job applicant because of his or her union sympathies or activities violates Section 8(a)(1) and (3) of the Act. However, in general, if all applicants for employment are judged pursuant to the same standards and hired or rejected based upon uniform application of a lawful standard, failure to consider or failure to hire would merely represent equal application of a common standard. In *Big E's Foodland,* 242 NLRB 963, 968 (1975), relied upon by counsel for the Charging Party, the following test is set forth in refusal-to-hire cases:

> Essentially the elements of a discriminatory refusal to hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer and further showing that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.

I find that Respondent had job openings at the time the batch applicants applied on June 30. Respondent was specifically told that the applicants were union members and would attempt to organize the Respondent's employees if hired. Respondent harbored animus toward the Union, as I have previously found. Based on this evidence, I find the General Counsel has sustained its initial burden to show that failure to consider or hire the batch applicants was motivated at least in part by their union activity.

Respondent defends its actions by asserting that when it did consider the batch applicants, their qualifications were inferior to the qualifications and experience of the applicants who were hired. The record does not support this assertion. Rather, the evidence establishes that different criteria were utilized for other applicants than for the batch applicants. Respondent hired at least 13 employees between June 30, the date of the batch applications, and mid-July.

During this period, Respondent hired Greg Rucker, who began working during the payroll period ending July 7. His most recent experience was listed on his June 3 application as job superintendent. However, Stewart testified that he did not hire alleged discriminatee Carsel because his most recent experience was as a job superintendent. Steve Rucker also applied on June

[12] Fred Stewart was training a new office clerical in billing and payroll procedures. He was performing ordinary end-of-the-month tasks including processing lien waivers from the previous month, invoicing, certification of prevailing wage payrolls, billing, and calculating percentage of job schedule of values.

[13] Respondent also argues that two of the alleged discriminatees were seen prior to their June 30 applications by Cron who observed they had alcohol on their breath. Respondent claims as to these two that this is the reason they were not hired. I do not credit the testimony that they had alcohol on their breath or the testimony that this was the reason their applications were rejected.

[14] *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). See also *Manno Electric,* 321 NLRB 278 (1996).

3 and began working during the July 7 payroll period. He had no relevant job experience. However, alleged discriminatee Shelly Williams, with 1 month of relevant experience, was deemed insufficiently qualified. Alleged discriminatee Mike Joyce, with 2 months dry wall and structural framing was, according to Stewart, not "interested" in dry wall and was not hired.

Larry Collinsworth's application listed several past employers who did not specialize in dry wall. His skills were listed as, "general shop skills in all phases." According to Stewart, applicants who met his needs generally listed, "dry wall metal stud." Based on Collinsworth's stated expertise, Stewart did not consider him further. Similarly, Stewart testified he rejected alleged discriminatee McFarland because his past experience was in tile work and eliminated alleged discriminatee Wilson because his expertise was layout, trim and millwright work. Apparently a different standard applied to applicant Fred Stegall whose February 19 application indicates, "farm carpentry, cement finisher and commercial construction." Based on these skills, Stegall was hired.

Alleged discriminatee Rausch indicated adequate experience to merit consideration, according to Stewart, but because he had not worked for over 3 months, Stewart eliminated him. Similarly, alleged discriminatees Hurn, Duncan, and Hensley were eliminated from consideration because their applications indicated they had not worked for 6 or 7 months, 11 months, and 13 months, respectively.[15] However, other applicants did not complete the dates or length of their former jobs and were hired. Derek Caughron, Jim Cherry, and Chris Davis are examples.

Based on this evidence, I conclude that Respondent has failed to show by a preponderance of the evidence that it would not have hired the batch applicants in any event. The evidence clearly indicates that Stewart routinely supplemented the information provided by applicants during his personal interviews and, based on all of the information, made his hiring decisions. This opportunity was not afforded the batch applicants. Based on the evidence summarized above, I find that the batch applicants were not considered and were not hired in violation of Section 8(a)(1) and (3) of the Act. Moreover, I find that Respondent's offers in October to 9 of the 10 batch applicants do not satisfy the requirements of an unequivocal offer of reinstatement because they were conditioned on attendance of a safety training session. These offers of reinstatement do not satisfy the requirements for an unequivocal, unconditional offer of full reinstatement to the former or a substantially equivalent position. See *Adsco Mfg. Corp.,* 322 NLRB 217, 218 (1996). The offers are conditioned on attendance of a safety meeting with a possibility of assignment or placement on a rehire list. Under these circumstances, backpay is not tolled.

7. Alleged policy to predate employment applications in order to avoid hiring union applicants

Facts—On July 3, Jonathan Hackenberg went to Respondent's office in Nixa, Missouri, and completed an employment application. Hackenberg was not connected with the Union in any way. The receptionist, Sandy Garlette, instructed Hackenberg to backdate his application because union representatives had been in the office earlier that week. Hackenberg dated his application June 3. Fred Stewart testified that he was not aware that Hackenberg had backdated his application. Stewart also testified that he never spoke to Cron about backdating applications and had no plan to backdate applications.

In late July, while working on the Carthage Elementary school project on HH Highway, Donald Gene Stewart Jr. (no relation to the owner Fred Stewart) was handed an authorization card by covert salt Jim Cherry during a break. Cherry announced that he was a member of the Union and if other employees would like to sign cards, he had cards available. Hackenberg, who overheard this conversation, said, "oh, now I know why they wanted me to backdate my application." Tom Cron was present when this happened. According to Cherry, Cron said, "I knew there was a salt on the crew but I never expected it was you." Cherry handed out cards to the entire crew.

Arguments—The Acting General Counsel and Charging Party argue that Garlette, as Respondent's receptionist, had apparent authority to advise employment applicants on the proper method for completing the applications. Counsel further argue that such a policy was unlawful because the purpose was to provide applications dated prior to the batch applicants' appearance on June 30. Respondent claims that Hackenburg's testimony is not credible but, rather, indicates that he was manipulated by the Union to state inaccurate facts.

Credibility—Garlette did not testify. Fred Stewart denied that there was any policy of backdating applications. I credit Hackenburg's unrebutted testimony that he was told by Garlette to backdate his application.

Analysis—I find that Garlette acted with apparent authority in making the statement to Hackenburg. Garlette was responsible for handing out job applications and could speak to applicants about employment needs. An applicant would reasonably conclude that she spoke on Respondent's authority concerning matters related to job application procedures. See *GM Electrics,* 323 NLRB 125, 127 (1997) (receptionist who handed out job applications possessed apparent authority regarding application process); *Diehl Equipment Co.,* 297 NLRB 504, 507 (1989) (secretary who passes out employment applications is agent regarding statements about hiring policy). Accordingly, I find that Respondent violated Section 8(a)(1) and (3) by requiring that Hackenburg predate his employment application.

8. Alleged discriminatory layoff of Allison and Piazza

Facts—Respondent assigned Allison to an elementary school in Carthage, Missouri. Mike Kirkpatrick was the foreman at that job. During this job, while Allison was teamed with Jerry Brown,[16] they were approached by the superintendent on the job who requested that they move one end of the wall they had installed in order that the roof on the new addition and the roof on the existing structure would properly align. Allison

[15] According to Stewart, Hurn was also eliminated because his experience was in wood framing and Respondent's work was metal framing. However, Stewart hired Joe Wilson, who also had a wood framing background.

[16] Allison recommended Brown, another covert salt, for the job with Respondent. Brown was hired in June.

talked with Kirkpatrick at lunch and Kirkpatrick told Allison to follow the superintendent's direction.

Later that evening, Kirkpatrick told Allison and Brown that Stewart was upset with them because they were taking too long and they needed to speed up their work. Allison spoke with Stewart that evening and was assigned to the Budgetel project.

The Budgetel project in Springfield, Missouri, was a new construction project. Allison and Piazza were assigned to this project in July. Steve Ceruzzi was the working foreman. The rest of the crew consisted of Dan Joiner, Ceruzzi's apprentice Justin Turnbaugh, James Carson, and Lloyd Capps. Respondent's employees initially installed metal studs and interior and exterior sheetrock. The crew had noticed that the woodwork team, which was responsible for installing the floor joists and plywood for each floor section, was behind. Consequently, the drywall work performed by Respondent was slowing down.

On July 23, at break, according to Allison, the crew expressed concern to Ceruzzi regarding layoffs. Ceruzzi said he would contact Stewart to find out if there would be a layoff. Ceruzzi reported back later in the afternoon that there would be plenty of work because the employees could weld[17] and perform exterior sheetrock work until the woodwork team caught up. Ceruzzi denied that this occurred. However, he agreed that the crew was aware that the woodwork team was going to slow down the sheet rock and framing work and he kept Fred Stewart informed. Allison revealed his union membership to Ceruzzi on July 23 and, further, in responding to Ceruzzi's question about others who might be union members, Allison revealed that Piazza also belonged to the Union.

In the middle of the workday on July 28,[18] Allison, Joiner,[19] Capps, and Piazza were laid off. According to Allison, he questioned Ceruzzi about his prior remark that there would be no layoff. Ceruzzi responded that Stewart would call the employees back in a week. Allison asked if they could leave their tools in the gang box and Ceruzzi said they should take their tools with them. Allison and Piazza were not recalled. When Allison visited the job about 2 or 3 weeks later, he saw two new men at the EPI gang box.

Ceruzzi recalled that Stewart told him to lay off Capps, Joiner, Piazza, and Allison because the floor contractor was behind.[20] Ceruzzi emphatically denied that he told any employees that there was other work to do until the carpenters caught up. However, Ceruzzi recalled speaking to Allison about the possibility that Allison might perform welding on the job.

Ceruzzi, Turnbaugh, and Carson reported to other jobs in the interim. Ceruzzi returned to Budgetel 2 weeks later with his apprentice, Justin Turnbaugh, and James Carson. No other employees worked on Budgetel until Ceruzzi reached the third floor. At that point, four plasterers, the Carters, were sent to the job. The Carters spent about 10 to 20 percent of their time performing interior framing. Stewart explained that he opted to use the Carters to perform carpentry work in order to keep them busy. In Stewart's view, plasterers are "tough to get" and, for that reason, he wanted to keep them busy.

Credibility—On balance, I credit Allison over Ceruzzi and find that on July 23, Ceruzzi told Allison that there would he need not worry about a layoff.

Arguments—Counsel for the Acting General Counsel and the Charging Party argue that a strong prima facie case has been made by evidence of activity, knowledge, timing, and animus. Further, they assert that Respondent's rationale for the layoff—seniority and moral conduct in the form of good work habits—are pretextual. Respondent disputes that a prima facie case has been made and claims that, in any event, Allison and Piazza were laid off for legitimate business reasons.

Analysis—Prior to the layoff, Respondent was aware of Allison and Piazza's protected activity on July 23. Animus is amply illustrated in the prior sections detailing various violations of Section 8(a)(1), including Stewart's statement that he was not going to be Union even if it cost him some money. Allison and Piazza were laid off on July 28, just 2 working days later. I conclude, based on this evidence, that counsel for the Acting General Counsel has sustained the burden of showing that a motivating factor in the layoff of Allison and Piazza was their protected activity.

It is clear that work on the Budgetel project had slowed and employees could not continue the framing until the woodwork contractor caught up. Ceruzzi told employees, however, that there was plenty of other work to be done even if framing could not be performed. The unrebutted evidence of Ceruzzi is that no employees of Respondent worked on the Budgetel project until he and his apprentice returned 2 weeks later with Carson.

Respondent does not have a uniform method of selecting employees for layoff. Respondent utilizes seniority on the project or with the company in combination with qualifications. Respondent had three other construction projects at the time Allison and Piazza were laid off: two other elementary schools in Carthage, Missouri (other than the one Allison had previously been assigned), and Southwest Missouri State University. Stewart thought highly of Piazza's qualifications. Moreover, Allison had been retained since April and transferred from at least three other jobs. Other employees with less seniority were retained at the time of the layoff. Under these circumstances, I find that Respondent has not sustained its burden of showing that Allison and Piazza would have been laid off in any event.

By letter of October 3, offers of employment as of 1:30 p.m. on Tuesday, October 7, were made to Allison and Piazza for the purpose of attending a 2-hour safety training program. The letter stated that from those who attended, a few were to be sent out to perform sheetrock hanging. Others would be placed on a

[17] Allison explained to Ceruzzi that he was a certified welder in connection with a conversation they had about "x-bracing," a wall stabilizer. Ceruzzi told Allison he might give him some welding work.

[18] Typically, the employees did not work on Friday. However, Friday, July 25, was scheduled as a workday to make up for a missed day. Allison did not work on Friday, July 25, because he had a meeting. He told Ceruzzi he would not be able to work on Friday on Thursday, July 24. Ceruzzi said that was no problem.

[19] Joiner was also a known union member. He asked not to be included in these proceedings.

[20] Ceruzzi told Allison that he liked his work. Ceruzzi assigned Allison to perform the "layout"; that is, setting the top and bottom tracks. In Allison's view, this job was the most crucial in ensuring the quality of work performed because if these tracks are not aligned properly, the wall will be crooked or lean.

hiring list. Allison did not pick up this letter at the post office until 3:30 p.m. on October 7.[21] He did not attempt to contact Respondent about this letter. He later received a phone message about attending another training class and he did not respond to that message. Piazza received the letter but did not attend because he was employed elsewhere.

These offers of reinstatement do not satisfy the requirements for an unequivocal, unconditional offer of full reinstatement to the former or a substantially equivalent position. See *Adsco Mfg. Corp.,* 322 NLRB 217, 218 (1996). The offers are conditioned on attendance of a safety meeting with a possibility of assignment or placement on a rehire list. Under these circumstances, backpay is not tolled.

9. Alleged discriminatory layoff of Brown and Phanelson

Facts—Jerry Brown and Tim Phanelson were laid off on July 28 from the Columbian Elementary school site in Carthage, Missouri. Phanelson was sheetrocking when Randy Rucker told him he was laid off. Phanelson asked Rucker why he was being laid off when there was still work to do. Rucker responded that he had been told by Tom Cron to lay off Brown and Phanelson and that was all he knew.

Phanelson testified he had asked Rucker just the prior week how much work was left and Rucker told him there was still two or three weeks of work on the project. Rucker acknowledged that Brown had distributed union authorization cards just prior to being laid off. Rucker could not recall discussing the Union with Brown but he did recall that Brown gave him an authorization card. As set forth, above, I have found that Brown discussed the Union with Rucker on several occasions in late July and on July 25, had a discussion about the Union.

Cron recalled that Brown and Phanelson were selected for layoff at the Fairview Elementary school because he was getting caught up on the HH Highway Carthage Elementary school and that crew had been with Respondent for a number of years. He determined to layoff crew at Fairview in order to place long term employees (Armondo Garnica and Ramon Gonzales) on that job. He picked Brown and Phanelson, the employees who had most recently been assigned to Fairview, for layoff. Rucker recalled that Garnica worked only 1 day at Fairview.

Arguments—Counsel for the Charging Party notes that although Phanelson was not active in union organizing, he worked closely with Jerry Brown, an open union advocate, on the Carthage project. In agreement, counsel for the Acting General Counsel asserts that the layoff of Brown and Phanelson was not a result of the job winding down—as asserted by Respondent—but rather was a direct result of Brown's union activity. Counsel for Respondent urges that Brown was laid off because he was the first person on the job and Phanelson was laid off because he was inexperienced.

Analysis—I find that counsel for the Acting General Counsel has made a showing that Brown's Union's activity was a motivating factor in the decision to layoff Brown and Phanelson. The elements of Brown's activity, Respondent's knowledge and animus, and timing are present. Respondent's stated reason for the layoff, the desire to transfer long-term employees to the project, appears pretextual in that one of these employees worked for Rucker only one day and then left. There is no showing that Respondent typically laid off shorter term employees when longer term employees were out of work. Accordingly, I find that the layoff was a pretext and that Phanelson was drawn into the scheme as a disinterested bystander.

Brown received a letter dated October 7 offering him employment as of 7 a.m. on Monday, October 13. He received the letter on October 11. The letter stated that he would attend a safety training program for 2 hours and then some of the employees who attended would be sent to perform work while others would be placed on a hiring recall list. Brown attended the safety meeting. When the safety meeting concluded, Brown spoke with Bryson Pellham about hanging sheetrock. Pellham told him he would call Brown in a few days. A week later, Brown was offered work at Budgetel. Brown began working for Respondent at the Budgetel project on October 23.

10. Alleged establishment of grievance and arbitration procedure in order to prevent access to the NLRB

Facts—By letter of July 29, counsel for Respondent informed the Union that if the Union or any of its members or supporters believe their rights have been violated, Respondent has arbitration provisions available to promptly resolve such disputes. A grievance form was attached. In addition, a voluntary grievance and arbitration procedure was prepared by counsel. Neither the procedural guidelines nor the forms have been distributed to employees nor has the grievance procedure been utilized. However, the current application form references the grievance and arbitration procedure.

The application form states that an employee *may* file a charge with the NLRB, or other appropriate agency, or the employee *may* utilize the alternative dispute resolution (arbitration) procedures. However, the "voluntary" procedures state that "any dispute shall be resolved through this grievance and arbitration procedure." "Sanctions in the form of reasonable costs, expenses and attorneys fees are authorized for improper resort to court or agency litigation in lieu of the "voluntary" procedures.

Argument—Counsel for the Acting General Counsel argues that the grievance/arbitration procedures are not voluntary but, rather, are contracts of adhesion with the effect of requiring employees to forgo access to the NLRB. Counsel for the Charging Party, relying on *NLRB v. Shipbuilding Local 22,* 391 U.S. 418 (1968), argues that the grievance/arbitration procedures constitute requiring exhaustion of private dispute resolution procedures in lieu of filing charges with the Board and are therefore unlawful. Respondent relies on judicial and legislative mandates, in general, supporting deferral of matters to alternative dispute resolution. Respondent also claims that its forms specifically state that employees may continue to file charges with the NLRB.

Analysis—Although no employee had utilized the procedure at the time of hearing, and it is, thus, uncertain whether the procedure is voluntary or mandatory, I find that Respondent must bear the burden of this ambiguity. The existence of such a mandatory procedure has a chilling effect on exercise of Sec-

[21] According to Allison, he was required to go to the post office to sign for this letter.

tion 7 rights and on free access to a Union or to the NLRB processes. Accordingly, I find the violation as alleged. See, e.g., *Kinder-Care Learning Centers,* 299 NLRB 1171, 1172 (1990).

11. Alleged discriminatory suspension of Easterly and Don Stewart

Facts—On August 1, the carpenters working for Dalton Killinger, the general contractor on the HH Highway Carthage Elementary school, went on strike. Respondent's employees on that job were assigned to other work beginning Monday, August 4. Don Stewart and Glen Easterly were assigned to the Fairview Elementary school, another elementary school in Carthage. Working Foreman Mike Vernon[22] assigned Don Stewart and Easterly to remove damaged sheetrock and a damaged metal door jam, around the principal's office, replace the damaged sheetrock and jam and continue the sheetrocking in that area. Vernon expected that this work could be completed by lunch.

In the next 2 hours, Don Stewart and Easterly removed five pieces of sheetrock from each side of the door and were ready to reinstall a new door frame. During this time, according to Don Stewart and Easterly, Vernon walked by several times and "mooed" at Don Stewart and Easterly. Vernon denied "mooing," although according to Vernon and various other witnesses, "mooing" at workers on a construction site indicates "milking" the job, that is, taking too long to perform a task. At another point during their work, Vernon inspected Don Stewart's work and told him to place additional screws in a butt joint. By lunchbreak, according to Don Stewart and Easterly, they had replaced the damaged door jam and reinstalled the ten pieces of sheetrock. However, according to Vernon, they hung only four sheets of rock that day and did not replace the door frame: "they didn't hardly do anything." Vernon did not know whether either Easterly or Don Stewart was involved with the Union.

After lunch, Don Stewart and Easterly continued sheetrocking their assigned area. When they ran out of framed area, they consulted Vernon about continuing the framing and he advised them to look for framing material and complete the framing. According to Don Stewart, in the course of searching for the framing material, he found a box of frisbees and threw one. He also plunked a few keys on a piano. He was in the room with the frisbees and piano for 2 minutes. Eventually, they found framing materials and returned to their work area and began framing. According to Don Stewart, Mike Vernon talked with them about 30 minutes during the afternoon, and during this time they were not working. During this time, according to Don Stewart and Easterly, they discussed the Union and Vernon accused them of attempting to "steal" the jobs. This has been detailed earlier.

At the end of the day, Vernon told Don Stewart and Easterly to call Fred Stewart the next morning to see if he had any work for them the next day. Don Stewart anticipated that the work at Fairview Elementary school was just a 1-day assignment and assumed that the Dalton Killinger labor dispute would be settled by the following day.

It was reported to Vernon that Don Stewart and Easterly were playing the piano, throwing frisbees, sitting on the scaffolding smoking cigarettes and not working. For instance, Guy Warnecke's job that day was to supply the sheetrockers. He observed Easterly and Don Stewart talking, walking around, sitting on the scaffolding, "and more or less doing nothing." Abraham Garnica and Daniel Najera also observed similar conduct. At the end of the day, Vernon requested that the crew write their observations of Easterly and Don Stewart. Vernon in turn reported this to Fred Stewart at the end of the day. On the following day, Najera and his partner completed the work that Easterly and Don Stewart had left unfinished. They discovered holes cut for windows in the wrong place and testified that only the easy parts of the work were completed. They also discovered that Easterly and Don Stewart had not plumbed the door so they performed this task the following day.

When Don Stewart called the office on the following morning, he was told there was no work but to call the next morning, August 6. Don Stewart called again on August 6 and was told to call again. Easterly was personally told by Fred Stewart that he was being suspended for horseplay on the job. Both Don Stewart and Easterly received letters dated August 7 stating that they were suspended for horseplay (throwing the frisbee and playing the piano), lack of productivity, and unsatisfactory work quality.

According to Fred Stewart, he received a call from Mike Vernon at the end of the workday on August 4. Vernon reported that Easterly and Don Stewart had been goofing off all day. Fred Stewart instructed Vernon to have both employees call him on the following day. According to Fred Stewart, he spoke with both employees on the following day and suspended them pending investigation. Thereafter, Fred Stewart spoke with employees who had witnessed Easterly's and Don Stewart's performance on August 4. In addition, Fred Stewart called Easterly and Don Stewart's former employers.[23]

An informal hearing regarding the suspensions was set for August 20. Don Stewart and Easterly responded to the notice of hearing protesting the charges and stating that they would attend the hearing. However, after consulting with the Union, they did not attend the meeting. By letters of August 20, Don Stewart and Easterly were requested to contact Respondent about failure to appear and to schedule a new hearing date. By letter of August 26, Don Stewart responded that he would attend a hearing.

Eventually, a new date for the Easterly-Don Stewart hearings, September 24, was set in Respondent's letter of August 29. Don Stewart and Easterly attended the September 24 hearing accompanied by Union Representatives Danny Hyde and

[22] This was Vernon's first assignment as working foreman. He began working for Respondent in November 1996.

[23] Chris Davis testified that he was laid off by Respondent on July 23 along with Don Stewart and Glen Easterly. He had been working at the Carthage HH Highway elementary school site. As Davis explained, he, Stewart and Easterly smoked marijuana at lunch that day. Shortly after lunch, Cron asked Davis if he had smoked marijuana. Davis confessed that he had. According to Davis, Cron suspended the three employees for 1day. None of the employees' personnel files contains any mention of this incident.

Jim Carsel. Present for Respondent was Fred Stewart, his counsel, and Bryson Pellham. Counsel conducted the interview, which was openly tape recorded. Both Don Stewart and Easterly were asked to complete new job applications. A voluntary alternative dispute resolution procedure was also offered to Don Stewart and Easterly if they wanted to sign it.

By letters of October 3, Don Stewart and Easterly were offered employment for 2 hours to attend a safety training program. The letters further stated that employees who attended the program might be sent out to perform sheetrock work or would be placed on a hiring recall list. Don Stewart and Easterly attended this safety meeting. Following the meeting, they inquired about their suspension. They were informed that no decision had been made. Neither of them was assigned work that day.

By letters of October 8, Don Stewart and Easterly were informed that their suspension had been long enough to indicate the seriousness of their misbehavior. The letter continued, "We are hereby calling each of you back to hang sheetrock at the Budgetel Inn as of Tuesday, October 14 at 7:00 a.m. You are to call the office at 8:00 a.m. Monday to verify that sheetrock hanging can begin Tuesday, due to inspection of other trades." Although Don Stewart and Easterly called, they were told there was no work. Don Stewart, by letter of October 13, informed Respondent that he disagreed that he had misbehaved or failed to produce while employed by Respondent but, in any event, he had taken a job with another company for the time being but would be interested in future jobs with Respondent.

About 2 weeks later, Easterly received a phone call at 5 p.m. from Bryson Pellham. Pellham told Easterly to be at the Budgetel site on the following morning. Easterly was unable to work the following morning because he had a sick child to care for. Easterly explained that when his daughter recovered, he would be able to work. On October 29, Easterly obtained employment elsewhere and informed Respondent he was no longer interested in employment with EPI.

Argument—Counsel for the Acting General Counsel and Charging Party assert that Stewart and Easterly should be believed over Respondent's witnesses and urge a finding that no misconduct occurred. Moreover, counsel for the Charging Party notes that Respondent admits that horseplay is common and that no other employees have been disciplined for horseplay. Respondent contends that the two were suspended for improper conduct and, in addition, asserts that no prima facie case has been made.

Analysis—Based on the framework in *Wright Line,* I find that General Counsel has shown that the suspensions of Don Stewart and Easterly were motivated, at least in part, by their union activity. In addition, I find that they would not have been discharged in any event. Somewhat incongruously, the strongest evidence that this is so was introduced by Respondent. Apparently Respondent concluded that Don Stewart and Easterly smoked marijuana at a prior jobsite. According to Respondent, they were suspended for 1 day for this behavior, which predated Respondent's knowledge of their union affiliation. After obtaining knowledge of the union membership of these employees, rather than counseling them to get back to work for their alleged horseplay, they were suspended indefinitely. I find that this would not have occurred but for their union activity and, accordingly, conclude that their suspensions violated Section 8(a)(1) and (3). Finally, as with the prior offers of reinstatement, I find that they were not unconditional and do not satisfy the criteria for tolling backpay.

12. Alleged interrogation

Facts—During the interview with Don Stewart and Glen Easterly in September, in addition to questioning Don Stewart about the incident leading to his suspension, counsel asked the following questions: "And you had not been involved in any Union salting activity, had you?"; "You weren't involved in any Union activity at all, were you?" At this point, Don Stewart and Danny Hyde apparently conferred and counsel said, "Ok, so you're not changing what you told me are you?" Don Stewart responded that he had signed a card. Counsel asked, "When did you sign a card?" After asking these questions, counsel stated,

> And let me say, you don't have to answer the question if you don't want to. I don't, you know, I usually give a *Johnnie's Poultry* assurance that you don't have to answer any questions about union activity or anything. The only reason that I might need to ask you that would be to investigate to prepare for an NLRB hearing and you're, I think Danny [Hyde] told you to volunteer that [to] me so you volunteered it and that's why I'm pursuing it, because I thought you wanted me to ask about it, but if you don't want me to ask about it, I won't ask about it, ok. I'm not going to be doing any illegal interrogation, but if you want to talk about it, you can and that's the reason I asked you 'cause Danny [Hyde] had whispered something in you ear [when you said that you weren't involved in any union activity] so you'd tell me about it. Now, and so you told me you signed a card and that's what Danny [Hyde] wanted you to tell me, right?

Don Stewart replied that the only union activity he was involved in was signing a card. Counsel continued to question Don Stewart about the circumstances of signing the card and whether any supervisors were present or knew of his signing the card. On two occasions, Danny Hyde interjected, "Is that pertinent, Don?" and, "Let's stop that line of questioning, please."

Arguments—Respondent asserts that Don Stewart—not counsel—injected the issue of signing a union card and only thereafter did Respondent's counsel ask whether a supervisor was present and give Don Stewart the assurances quoted above. Respondent also asserts that its assurances satisfied *Johnnie's Poultry.* Counsel for the Acting General Counsel and counsel for the Charging Party argue that the interrogation was not privileged by proper assurances.

Analysis—I find the violation as alleged. In *Johnnie's Poultry,* 146 NLRB 770, 775 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965), the Board set forth its requirement that certain verbal assurances be given to employees when questioning to ascertain necessary facts to prepare the employer's defense for trial. The employee must be informed about the nature of the questions. The employee must be as-

sured that no reprisals will take place and that participation is voluntary. Finally, the questioning must occur, 146 NLRB at 775:

> [I]n a context free from employer hostility to union organization and must not be itself coercive in nature; and the questions must not exceed the necessities of the legitimate purpose by prying into other union matters, eliciting information concerning an employee's subjective state of mind, or otherwise interfering with the statutory rights of employees.

See also *ITT Automotive,* 324 NLRB 609, 610 (1997); *L & L Wine & Liquor Corp.,* 323 NLRB 848, 854 (1997).

Counsel initiated the questioning about union activity. The tape recording transcript indicates two questions about union activity before Don Stewart "volunteered" that he had signed a card. Moreover, the assurances given to Don Stewart fall short of the assurances required. First, they were tardy. Second, there was no assurance that no reprisals would take place if Don Stewart refused to answer. Third, the questions exceeded the scope of the interview—which was to determine whether the suspension was correctly imposed. Under these circumstances, I find the interrogation violated Section 8(a)(1).

13. Alleged discriminatory implementation of drug and alcohol abuse policy

Facts—On August 8, Respondent announced a mandatory drug testing policy and changed its attendance rules effective September 1. There had been no written drug testing policy at Respondent in the last 6 years. However, Stewart testified there was an unwritten policy of "no drugs, no drinking or you're fired." Stewart explained that he issued a written drug testing policy because he thought it was necessary in order to bid on Federal projects. He stated that about 1 year ago, Respondent began considering such work at Fort Leonard Wood. Fred Stewart agreed that he had bid on a Federal project previously and not been precluded from bidding because he had no written policy. He explained that he assumed this was because many of the general contractors had such policies in place and as a subcontractor such policies would extend to him. The attendance rule change involved contacting the office, rather than the foreman, regarding absences.

Arguments—Respondent contends that there is no evidence that the substance abuse policy was aimed at the Union or its supporters and notes, in particular, that the union favors such policies. Respondent also asserts that the written policy merely implemented an unpublished policy in existence long before the advent of union activity. Counsel for the Acting General Counsel and for the Charging Party argue that the timing of implementation of the policy supports an inference that Respondent's actions were unlawful. Moreover, they claim that the stated reason for implementation of the policy, to bid on Federal projects, was pretextual.

Analysis—Although drug and alcohol policies certainly serve legitimate employer interests, the issue before me is the timing of announcement and implementation of the written rules. Respondent's asserted reason for implementation, bidding on federal jobs, does not support the timing of its announcement and implementation. Rather, it appears that the written rules were announced shortly after Respondent obtained knowledge of its employee's union activities. I find that this supports an inference of unlawful motivation and that no other legitimate reason has been advanced. Accordingly, I find promulgation of the rules discriminatorily motivated.

CONCLUSIONS OF LAW

1. By informing its employees that it would be futile to select the Union as their bargaining representative, creating the impression among its employees that their union activities were under surveillance, promulgating a rule that discriminatorily prohibited employees from talking about the Union or any other labor organization while working, interrogating its employees about their union membership, activities, and sympathies, and threatening its employees with layoff if they supported the organizing efforts of the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By implementing a drug and alcohol abuse and testing policy as a term and condition of employment, requiring an applicant to predate his employment application in order to avoid hiring union applicants, refusing to consider for hire or to hire applicants because of their union membership or activities, and laying off Charles Allison, Tom Piazza, Jerry Brown, and Tim Phanelson, and suspending Glen Easterly and Don Stewart because of their union membership or activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. By establishing a grievance and arbitration procedure restricting the rights of employees to use to the processes of the NLRB, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (4) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off Allison, Piazza, Brown, and Phanelson, and discriminatorily suspended Easterly and Don Stewart, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of layoff to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having failed to consider for hire or to hire James Carsel, Larry Collinsworth, Roger Hensley, Bob Hurn, John Duncan, Tom McFarland, Mike Joyce, Shelley Williams, Steven Wilson, and Matthew Rausch, Respondent is obligated to make whole those applicants it would have hired but for its unlawful refusal to consider their applications. Backpay is not limited to jobs in progress at the time of the unlawful refusal to consider but will include any amounts these discriminatees would have received on other jobs to which Respondent would later have

assigned them. Finally, if Respondent would later have assigned any of these discriminatees to current jobs, it will be directed to hire those individuals and place them in positions substantially equivalent to those for which they applied. These issues will be determined in the compliance phase. See *Ultrasystems Western Constructors,* 316 NLRB 1243 (1995).

[Recommended Order omitted from publication.]